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STUDENT PROJECT

ATTORNEY ADVERTISING: *BATES'* IMPACT ON REGULATION

"Since the belief that lawyers are somehow 'above' trade has become an anachronism, the historical foundation for the advertising restraint has crumbled." Bates v. State Bar of Arizona, 97 S. Ct. 2691, 2703 (1977).

Ensuring proper conduct in the practice of law is the primary purpose of the American Bar Association Code of Professional Responsibility.¹ This paradigm for professional conduct has served several functions. The state bar associations look to the ABA Code as a model for their ethical codes. Attorneys look to the Code for individual guidance and for ensuring the proper conduct of other attorneys. The landmark decision of *Bates v. State Bar of Arizona* adds another function to the Code: assuring the public of its ability to learn about the availability of legal services through the regulated advertising of attorneys.

Defendants Bates and O'Steen, operating a legal clinic in Phoenix, Arizona, placed an advertisement in the *Arizona Republic*, offering "legal services at very reasonable fees."² The ad specifically listed the rates charged for certain legal matters, denominated routine by the defending attorneys.³ Bates and O'Steen conceded that their advertisement violated Disciplinary Rule 2-101(B),⁴ which the Supreme Court of Arizona had adopted as Rule 29(a).⁵ Acting in accordance with the rules promulgated

1. ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE].

2. 97 S. Ct. 2691, 2694. For amendments to Canon 2, see Appendix D.

3. Charges were for uncontested divorces; legal separations; preparation of court papers; instructions on how to do your own simple, uncontested divorce; uncontested severance proceedings; adoptions; nonbusiness, noncontested bankruptcies; and name changes. *Id.* at 2710.

4. ABA CODE DISCIPLINARY RULE 2-101(B) [hereinafter cited as DR 2-101(B)]. See Appendix D.

5. 17A ARIZ. REV. STAT., Sup. Ct. Rules, Rule 29(a) (1976 Supp.) provides in part: A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

by the Arizona Supreme Court, the Arizona state bar then filed a complaint. A three member committee of the bar, on hearing, recommended at least a six-month suspension from practice for each attorney. The state bar's board of governors reviewed the situation and reduced the suspension to one week. Bates and O'Steen subsequently appealed to the Arizona Supreme Court on antitrust and first amendment grounds. The court rejected both grounds, but reduced the penalty from suspension to censure.⁶ The United States Supreme Court ultimately reversed on the first amendment issue and upheld the Arizona court on the antitrust issue.⁷ The *Bates* decision allows for the advertisement of routine legal services⁸ and recognizes that "false, deceptive, or misleading" advertising can be regulated.⁹

Taking these guidelines, the American Bar Association Task Force on Lawyer Advertising developed recommendations on how the Bar could respond to the Court's decision.¹⁰ From these recommendations, the Committee on Ethics and Professional Responsibility developed a pair of alternative amendments to the ABA Code of Professional Responsibility.¹¹ The sum of this effort resulted in the revised Canon 2, adopted by the ABA at its annual meeting in Chicago on August 10, 1977.¹²

The adopted revision to Canon 2 of the ABA Code suggests to state bar associations the proper and ethical conduct to be achieved by the state bars' regulations for the advertisement of legal services. Language throughout *Bates* teaches attorneys the minimum to expect for themselves and from other attorneys in their first amendment right to advertise. With the public's interest at stake on the other side of first amendment protection, yet another perspective from the ABA Code has resulted: that of extraprofessional regulation. Attorneys' advertising conduct will

Id., quoted in *Bates*, 97 S. Ct. at 2694 n. 5.

6. 97 S. Ct. at 2695-96.

7. *Id.* at 2709.

8. *Id.* at 2703.

9. *Id.* at 2708.

10. *Supreme Court Holds Lawyers May Advertise*, 63 A.B.A.J. 1093, 1097 (1977); AMERICAN BAR ASSOCIATION [hereinafter cited as ABA]. The Task Force held an organizational meeting on July 1, 1977, chaired by S. Shepherd Tate, the president-elect of the ABA. Additional members included Michael Franck of Lansing, Michigan; Thomas S. Johnson of Rockford, Illinois; Kirk McAlpin of Atlanta, Georgia; John C. McNulty of Minneapolis, Minnesota; and Lewis H. Van Dusen, Jr., of Philadelphia, Pennsylvania.

11. *Id.* at 1097.

12. ABA Press Release (Aug. 18, 1977); see 46 U.S.L.W. 2092, 2093 (Aug. 23, 1977).

be subject not only to their intraprofessional standards but also to any applicable legal standards developed by the courts and by legislation.

The first section of this project summarizes the history of the commercial speech doctrine and compares parts of the amendment to Canon 2 with the *Bates* mandate. The next division analyzes the historical difficulties of the profession's disciplinary systems and of advertising and suggests particular problem areas that the use of advertising might present for intraprofessional regulation. The third part details the development of legal and ethical standards of conduct and surveys the functions of extraprofessional bodies, which have the responsibility of policing attorney advertising. The last division compares the state bar associations' proposals with the revised ABA Canon 2 and *Bates* language based on the results of a letter inquiry conducted shortly after the *Bates* decision was announced.¹³

I. THE FIRST AMENDMENT AND ATTORNEY ADVERTISING

If one phrase were selected from the *Bates* opinion to summarize that decision, it would necessarily be "reasonable regulation."¹⁴ The decision is the latest in a series of Supreme Court opinions that have attempted to limn first amendment protection of commercial advertising. For years the Court held that "commercial speech"¹⁵ was outside the realm of the first amendment and, therefore, the states were free to regulate it as they deemed necessary. Gradually, the Court created numerous exceptions that diluted the general rule. With the *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁶ decision in 1976, the Court reduced the commercial speech doctrine to a balancing test to determine the limits of state regulation in the commercial area. Although commercial advertising was found to be a protected form of speech, the Court did not hold that this form of speech was free from regulation. To the contrary, the

13. Solicitations were conducted by the South Carolina Law Review Comments Office from August 16, 1977, and were updated through October 1977 (responses on file in the South Carolina Law Review Comments Office).

14. 97 S. Ct. 2691 (1977).

15. This is the term used to refer to commercial advertising, which was determined in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to be outside the protection of the first amendment.

16. 425 U.S. 748 (1976).

Court stated that the potential of unrestrained advertising to mislead the consumer requires strict regulation. This potential is inevitable in the advertising of professional services in which there is an especially great possibility of deception. The Court in *Bates* delegated the task of regulating attorney advertising to the organized bar.¹⁷ Whether the responses of the state bar associations to *Bates* will prove to be adequate for the consumer and the attorney will ultimately depend on the success or the failure of regulatory entities in enforcing the revised professional guidelines.

A. *The Commercial Speech Doctrine*

The commercial speech doctrine was first articulated by the Supreme Court in the case of *Valentine v. Chrestensen*.¹⁸ Justice Roberts' short, but far-reaching opinion set the stage for thirty-five years of confusion as to what type of commercial expression was protected by the first amendment.¹⁹ The case held that although the government may not constitutionally proscribe the communication of information or dissemination of opinion in the public streets, "the Constitution imposes no such restraint on government as respects purely commercial advertising."²⁰ Thus, the Court determined that the first amendment provided no protection to one attempting to "pursue a gainful occupation in the streets" and termed the matter as one "for legislative judgment."²¹ The Court cited no authority for the doctrine in its opin-

17. 97 S. Ct. at 2709.

18. 316 U.S. 52 (1942). This suit arose out of a challenge to a New York City ordinance that prohibited the distribution of handbills in the city's streets. The respondent sought to distribute handbills to advertise the submarine he had brought to New York from Florida and had opened to the public for a stated admission fee. On the reverse of the handbill, the respondent had printed a message protesting the city's refusal to allow the docking of his submarine at a public pier. The Court disregarded the protest message because it was a mere facade to evade the prohibition of the statute.

19. See Comment, *The Demise of the Commercial Speech Doctrine and the Regulation of Professional's Advertising: The Virginia Pharmacy Case*, 34 WASH. & LEE L. REV. 245 (1977). "From its inception, the [commercial speech] doctrine was ambiguous, difficult to apply, and engendered much controversy and comment." *Id.* at 245. But see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). "Up to the present, the problem of differentiating between commercial and other communication has not in practice proved to be a serious one." *Id.* at 949 n.93.

20. 316 U.S. at 54.

21. *Id.* See also 34 WASH. & LEE L. REV. 245, note 19 *supra*, at 247; Note, *The Commercial Speech Doctrine: The First Amendment at a Discount*, 41 BROOKLYN L. REV. 60, 67 (1974).

ion, but the decision's basis appears to be the right of the public to use the streets free from the harassment of solicitation by merchants.

After *Chrestensen*, the Supreme Court continued to apply the commercial speech doctrine in a perfunctory fashion.²² If a publication could be labeled a "paid 'commercial' advertisement,"²³ it would be stripped of all first amendment protection and would be subject to complete regulation or prohibition by the state. Finally, the Court attempted to temper the harsh effect of the doctrine in *New York Times Co. v. Sullivan*²⁴ by creating an exception for a paid advertisement that "communicated information . . . of the highest public interest and concern."²⁵ In this case the plaintiffs argued that a full-page notice placed in the *New York Times* by the Committee to Defend Martin Luther King was not entitled to first amendment protection because it was in the form of a "paid 'commercial' advertisement."²⁶ The Court upheld the defendant's first amendment assertions by declaring the fact that "the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."²⁷ Although this public interest exception avoided the harsh results of strict adherence to the commercial speech doctrine, it provided little guidance for future application of the *Chrestensen* rule. Logically, this exception could have been expanded to such an extent that it would have diminished the general rule. For example, the political portion of the *Chrestensen* advertisement could arguably have been categorized as of public interest and, thus, within the first amendment protection created by *New York Times*.²⁸ What was needed was a test to determine how substantial the public interest must be in order to neutralize the commercial speech doctrine.

The opportunity for the Court to clarify the status of the doctrine presented itself in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.²⁹ This case involved an at-

22. See, e.g., *Breard v. City of Alexandria*, 341 U.S. 622 (1951).

23. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

24. 376 U.S. 254 (1964).

25. *Id.* at 266.

26. *Id.* at 265.

27. *Id.* at 266 (citations omitted).

28. *Id.* In *Chrestensen*, the reverse side of the handbill contained a political advertisement, as well as a commercial advertisement on the front. See note 18 & accompanying text *supra*.

29. 413 U.S. 376 (1973).

tempt by the National Organization for Women (NOW) to enforce a Pittsburgh city ordinance that prohibited the designation in employment advertisements of male or female jobs without a bona fide occupational qualification. In spite of first amendment assertions by Pittsburgh Press, the Court termed the discriminatory advertisements as "classic examples of commercial speech."³⁰ The public interest exception was found not to be applicable, since none of the advertisements expressed "a position . . . of social policy . . . nor [did] any of them criticize the Ordinance or the Commission's enforcement practices."³¹ Rather than base its decision squarely on the commercial speech doctrine, however, the Court added further uncertainty to the area by stating that "[d]iscrimination in employment is not only commercial activity, it is *illegal* commercial activity"³² Since employment discrimination was illegal under the ordinance, the city was certainly authorized to prohibit its promotion. The illegal activity rationale enabled the Court to evade the commercial speech doctrine, which many commentators had projected would be overruled in *Pittsburgh Press*.³³

B. *The Downfall of the Commercial Speech Doctrine Under a First Amendment Balancing Test*

The Court's equivocation in *Pittsburgh Press* was challenged two years later in *Bigelow v. Virginia*.³⁴ This case involved a paid advertisement placed in a Virginia newspaper for a New York abortion service. A Virginia statute prohibited the advertising of

30. *Id.* at 385.

31. *Id.*

32. *Id.* at 388.

In *Pittsburgh Press*, the Court employed the *New York Times* analysis and concluded that the employment advertisement did not convey information concerning public issues. In addition, the Court stated that because the advertisements also furthered illegal activity they would not be entitled to first amendment protection. . . . Both *Pittsburgh Press* and *New York Times* attempted clarification of the commercial speech doctrine, but neither succeeded. Instead, these two cases weakened the once firm principle and intensified the mounting criticism of the doctrine.

34 WASH. & LEE L. REV. 245, note 19 *supra*, at 250-51 (footnotes omitted).

33. See Comment, *The Commercial Speech Doctrine: Bigelow v. Virginia*, 12 URB. L. ANN. 221 (1976). Many theorists believed that "the time was ripe for a definitive statement and that the Court would either establish the boundaries of the doctrine or abrogate it altogether, at the next opportunity." *Id.* at 227; see also Devore & Nelson, *Commercial Speech and Paid Access to the Press*, 26 HASTINGS L.J. 745, 774 (1975).

34. 421 U.S. 809 (1975).

abortion information, and Bigelow, the managing editor of the paper, was convicted for violation of that statute. On appeal the Supreme Court reversed the conviction and distinguished this situation from the ordinary commercial speech issue. "The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'"³⁵

Although *Bigelow* did not decide the extent of first amendment protection for commercial advertising, the opinion suggested that commercial speech could be entitled to some degree of first amendment protection and that the familiar balancing test³⁶ would be the appropriate standard in determining the limits of future protection. "Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."³⁷

The Court's reasoning presaged the resolution of many issues to be raised in *Bates*. A major shortcoming of the opinion, however, was the Court's failure to clarify what would encompass the "First Amendment interest at stake."³⁸ The Court avoided detailing "the type of social interests that commercial speech furthers,"³⁹ which the majority had intimated should be balanced against the state's interest in regulation.⁴⁰ "Protected speech may be restricted . . . if the interests of the state in the regulation outweigh the first amendment interests in the expression."⁴¹ The traditional method used by the Court in determining the limits

35. *Id.* at 822.

36. Basically, in order to apply the test it must first be determined what, if any, first amendment interest is furthered by the speech in question. That interest must then be weighed against the justifications asserted by the state in regulating or restricting the speech. The end result is a judicial determination of the extent of allowable state regulation. See, e.g., *Kunz v. New York*, 340 U.S. 290 (1951); *Niemokto v. Maryland*, 340 U.S. 268, 273-89 (1950) (Frankfurter, J., concurring). See also A. MEIKLEJOHN, *FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT* (1948); Emerson, note 19 *supra*.

37. 421 U.S. at 826.

38. *Id.*

39. 34 WASH. & LEE L. REV. 245, note 19 *supra*, at 253.

40. See 421 U.S. at 826. "First amendment protection, of course, is not determined in an all-or-nothing basis." Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 447 (1971).

41. 34 WASH. & LEE L. REV. 245, note 19 *supra*, at 257.

of such allowable restriction has been a balancing test.⁴² In order to apply the balancing test, the competing interests at stake must be clearly delineated. These factors were not identified in *Bigelow* and remained undefined until 1976 when the Supreme Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.⁴³

Holding that commercial speech is entitled to some degree of first amendment protection,⁴⁴ the Court in *Virginia Pharmacy* also clarified the factors to be weighed in considering a regulation of commercial speech. A group of consumers brought the suit, claiming that their first amendment rights had been abridged by the state's prohibition of price advertising by pharmacists. The plaintiffs alleged they had been denied access to the free flow of commercial information.⁴⁵ The majority found that the interest of the consumer⁴⁶ in receiving information of a commercial nature is the proper focus in the first amendment balancing process.⁴⁷

The structure of the test had been distinctly outlined by the adversaries in *Virginia Pharmacy*. The need for consumers with

42. For an exhaustive study of the balancing test in first amendment analysis, see MEIKLEJOHN, note 36 *supra*; see also Emerson, note 19 *supra*; Redish, note 40 *supra*, at 429.

43. 425 U.S. 748 (1976).

44. *Id.* at 761.

45. *Id.* at 753-54. The right of access doctrine was not a novel one to the Supreme Court. See generally NAACP v. Button, 371 U.S. 415 (1963); Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1185-86 (1972); see also United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971); UMW, District 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1 (1964).

46. Justice Rehnquist, however, disagreed with the majority's analysis, "I do not find the question of the appellees' standing to urge the claim which the Court decides quite as easy as the Court does." 425 U.S. at 781-82 (Rehnquist, J., dissenting). It is interesting to note, however, that the Court did not overrule *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821 (W.D. Va. 1969), which had previously upheld the same regulation questioned in *Virginia Pharmacy* against an attack by pharmacists. Instead, the Court adopted the lower court's distinction regarding the plaintiffs in *Patterson Drug*: "[T]heirs was a prima facie commercial approach." 425 U.S. at 755 (quoting *Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy*, 373 F. Supp. 683, 686 (E.D. Va. 1974)). See also Comment, *Advertising of Professional Fees: Does the Consumer Have a Right to Know?*, 21 S.D.L. Rev. 310 (1976).

47. 425 U.S. at 756-57. "Freedom of speech presupposes a willing speaker. . . . [T]he protection afforded is to the communication, to its source and to its recipients both. . . . If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." *Id.* See Comment, *Constitutional Law: The Commercial Speech Doctrine and the Consumer's Right to Receive*, 16 WASHBURN L.J. 197 (1976); 81 YALE L.J. 1181, note 45 *supra*, at 1185-91; 34 WASH. & LEE L. REV., note 19 *supra*, at 256-57.

low or fixed incomes to receive the best price possible on prescription drugs, society's interest in the free flow of commercial information affecting the public interest, and the goal of efficiently allocating the nation's resources were some of the justifications advanced in favor of the consumer's right to receive such information. The state countered with arguments such as the adverse effect on professionalism, the potential of price advertising to mislead, and the fear that price shopping by patients would result in the loss of stable pharmacist-patient relationships. Upon consideration of all the competing interests, the Court concluded that "the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance."⁴⁸ Cast in this light, the consumer's interest should clearly prevail: "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."⁴⁹ However, as Justice Stewart pointed out in his concurring opinion, "there are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other."⁵⁰ With ideological communication, "disregard of the 'truth' may be employed to give force to the underlying idea expressed by the speaker."⁵¹ Justice Stewart reasoned that "[u]nder the First Amendment there is no such thing as a false idea," and that the only way that ideas can be suppressed is through "the competition of other ideas."⁵² There is no room to stray from the truth in commercial advertising; speech in this area must be subject to reasonable controls in order to assure that the consuming public will not be deceived by false or misleading statements. Justice Stewart employed the reasoning of the majority opinion to show that regulation does not offend traditional notions of first amendment protection:

The First Amendment protects the advertisement because of the "information of potential interest and value" conveyed, . . . rather than because of any direct contribution to the interchange of ideas. . . . Since the factual claims contained in commercial price or product advertisements relate to tangible goods

48. 425 U.S. at 769.

49. *Id.* at 770. See also 34 WASH. & LEE L. REV. 245, note 19 *supra*, at 257.

50. 425 U.S. at 779 (Stewart, J., concurring).

51. *Id.* at 780.

52. *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dissemination of thought. Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.⁵³

Thus, the Court concluded in *Virginia Pharmacy* that the consumer's right to hear information of a commercial nature was sufficiently significant to override the state's interest in proscribing advertising by pharmacists. However, the majority had been cautious not to rule that commercial speech "can never be regulated in any way."⁵⁴ Regulation of time, place, and manner, deceptive advertising practices, and restrictions against advertising illegal products were some of the problem areas mentioned by the Court,⁵⁵ but other areas in which regulation might be necessary were not foreclosed.⁵⁶ Thus, the Court determined that speech in the commercial area, although not "wholly outside the protection of" the first amendment,⁵⁷ was nevertheless subject to stricter controls than other protected forms of speech due to the potential of commercial advertising to mislead the consumer.

C. *Lawyer Advertising in the Balance*

Writing for the majority in *Bates*, Justice Blackmun termed the decision as one flowing "*a fortiori*" from the decision in *Virginia Pharmacy*.⁵⁸ The reasoning in the two cases was almost identical,⁵⁹ and issues previously raised were refined further in *Bates*. The Court began its consideration of the first amendment issues with a review of the analysis developed in *Virginia Pharmacy* and then embarked on a lengthy discussion of the competing interests involved in the balancing process. Receiving information about the prices charged for legal services was found to be as substantial an interest as the right to learn about prescription prices. On the other side of the scale, however, the Court

53. 425 U.S. at 780-81 (citations omitted).

54. *Id.* at 770.

55. *Id.* at 771-72.

56. *Id.* at 770.

57. *Id.* at 761.

58. 97 S. Ct. 2691, 2700.

59. Justice Blackmun wrote the majority opinion in both cases.

emphasized that the state's interest might be much stronger in regulating the advertising of professional services, than in regulating price advertising of prepackaged drugs.⁶⁰ The fear that consumers of legal services will choose an attorney solely on the basis of his fees, rather than on the more important factors of skill and experience, was a major argument advocated by the bar. It termed attorney advertising as "inherently misleading"⁶¹ and argued that legal services could not be advertised in a way to prevent the public from being deceived. Noting the bar's concern, the majority recognized that "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."⁶²

Despite these and other convincing justifications for the proscription of advertising of legal services, the five-man majority still was persuaded that "the flow of such information may not be restrained."⁶³ But "many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved,"⁶⁴ and the Court emphasized "that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly."⁶⁵ In fact, the need for reasonable regulation is relatively greater when the subject of the advertisement is professional services, as opposed to prepackaged drugs, because of the inherently misleading nature of such advertising.⁶⁶ Since the dangers to the consumer are greater

60. We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

Virginia Pharmacy, 425 U.S. 748, 773 n.25 (emphasis in original).

Mr. Justice Powell, dissenting in *Bates*, further refined this difference, based on two fundamental distinctions: "the vastly increased potential for deception and the enhanced difficulty of effective regulation in the public interest." 97 S. Ct. at 2713 (Powell, J., concurring in part, dissenting in part).

61. 97 S. Ct. at 2703.

62. *Id.* at 2709.

63. *Id.*

64. *Id.*

65. *Id.*

66. Advertising of legal services is inherently misleading due to general public ignorance in legal matters and the difficulties of defining "routine legal services." *Id.*

in the form of attorney advertising than in other forms, the allowable level of regulation must be proportionately higher. The need for reasonable regulation is therefore apparent as an essential factor in the first amendment calculus. Effective controls tend to diminish the dangers inherent in advertising practices and to act as a counterweight in the balance. Although the consumer's interest in the free flow of information may be substantial enough to override a total proscription of advertising, the question of how much regulation is reasonable arises in every case. The resolution of that problem necessarily depends on the outcome of the initial balancing of the competing interests at stake. In order to be reasonable, a regulation must be sufficiently restrictive to protect the consumer from being misled by deceptive advertising and yet allow for the free flow of important commercial information.⁶⁷

After it has been established that the state has an important interest in regulating advertising, the next logical step in the analysis is to determine if any method of enforcement can be devised to meet the goal of effectively protecting the consumer. Unless it is effective, no regulation can sufficiently carry its weight in the first amendment balance, no matter how restrictive it may seem on its face. The majority in *Bates* placed great reliance on the bar's ability to police its members adequately, as well as its capacity to educate the public.⁶⁸ On the other hand, Chief Justice Burger and Justice Powell, in separate dissenting opinions, did not express confidence in the "presently deficient machinery of the bar and courts."⁶⁹ In fact, Chief Justice Burger's appraisal of the bar's inability to handle the task was primary to his reasoning that the scales should tip the other way and disallow lawyer advertising. He characterized the majority opinion as "a 'great leap' into an unexplored, sensitive regulatory area where the legal profession and the courts have not yet learned to crawl, let alone stand up or walk."⁷⁰ Justice Powell continued the attack on the majority, declaring that "[t]he Court's almost casual

67. This dual mandate was expressed by the Court in terms of "insuring that the stream of commercial information flow cleanly as well as freely." 425 U.S. at 772. See also 97 S. Ct. at 2709.

68. See 97 S. Ct. at 2704. "If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." *Id.*

69. *Id.* at 2711 (Burger, C.J., concurring in part, dissenting in part). See Section II *infra*.

70. *Id.*

assumption that its authorization of price advertising can be policed effectively by the Bar reflects a striking underappreciation of the nature and magnitude of the disciplinary problem."⁷¹

It is clear from these conflicting views expressed in *Bates* that the factor of effectiveness will be primary in future judicial scrutiny of any regulatory measures concerning advertising propounded by the bar. No regulation will be allowed if it prevents the dissemination of useful consumer information, and unless it accomplishes the task of protecting the unwary consumer of legal services from being deceived. Whether any regulation meets this second requirement will necessarily depend on how effective the rule proves to be in practice. Thus, when scrutinizing a regulation in the future, once it has been determined not to restrict unconstitutionally the flow of truthful information, a court must see whether the rule is equipped with a workable mechanism for effective enforcement of its regulatory scheme.

D. *The ABA Responds: Revisions in Canon 2*

In an effort to meet the challenge proposed by the *Bates* Court, the ABA House of Delegates approved, on August 10, 1977, at its annual meeting in Chicago, major changes in Canon 2 of the Code of Professional Responsibility.⁷² Although the ABA Code is merely a model, it will undoubtedly be used by many state bars in formulating their disciplinary rules and will, therefore, be a good indicator of the approach that will be taken by most states in discharging their special role of regulation.⁷³ Within the framework of the *Bates* mandate, the revised guidelines must be tested in light of the consumer's first amendment right to receive information about legal services.

The Court specifically held that "[t]he State may [not] prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services."⁷⁴ The ABA regulations satisfy this minimum requirement and further permit the lawyer to publicize "[f]ixed fees for specific legal services, the description of which would not

71. *Id.* at 2715 (Powell, J., joined by Stewart, J., concurring in part, dissenting in part).

72. See ABA CODE OF PROFESSIONAL RESPONSIBILITY AMENDMENTS, 46 U.S.L.W. 1 (Aug. 23, 1977), reprinted in Appendix D.

73. See Section IV *infra*.

74. 97 S. Ct. at 2709.

be misunderstood or be deceptive”⁷⁵ Furthermore, the rules list twenty-five areas of allowable disclosure “[i]n order to facilitate the process of informed selection of a lawyer by potential consumers of legal services”⁷⁶ Thus, the regulations seem to satisfy the first amendment requirements of *Bates*, as well as to provide a mechanism for expansion of the areas of allowable disclosure should the need arise.⁷⁷

The second prong of the test, whether the guidelines provide an effective mechanism for protecting the consumer, must also be satisfied. The dissenting justices in *Bates* feared that the regulatory task “could prove to be a wholly intractable problem,”⁷⁸ “where not even the wisest of experts—if such experts exist—can move with sure steps.”⁷⁹ The ABA’s response to this challenge seems to provide a workable framework for regulating advertising by lawyers. The amendments describe specific guidelines for lawyers to use in planning their advertising campaigns.⁸⁰ Added consumer protection is provided by requiring a disclaimer “that the quoted fee will be available only to clients whose matters fall into the services described”⁸¹ Any requested expansions of the allowable disclosures in DR 2-101(B) must be reviewed by the state agency charged with the task of enforcing the rules. It shall determine “whether the proposal . . . accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of” informing potential clients.⁸² In the abstract, therefore, the regulations promulgated by the ABA provide for the free and clean flow of attorney advertising.

Thus, the rules apparently define a workable procedure for regulating lawyer advertising. The test, however, will come in the actual day-to-day enforcement of the regulations by the state and local bars. The amendments also provide a practicable structure for accomplishing the *Bates* mandate of protecting the consumer. The question that remains is whether the present

75. DR 2-101(B)(25). See Appendix D.

76. DR 2-101(B). See Appendix D.

77. There is also a provision for expanding the area of allowable disclosure if it is determined that the first amendment interests of the consumer demand more information. See DR 2-101(C). See Appendix D.

78. 97 S. Ct. at 2716 (Powell, J., concurring in part, dissenting in part).

79. *Id.* at 2711 (Burger, C.J., concurring in part, dissenting in part).

80. DR 2-101(B). See Appendix D.

81. DR 2-101(B)(25). See Appendix D.

82. DR 2-101(C). See Appendix D.

machinery of the bar can effectively coordinate an enforcement program that will be fair to both lawyers and consumers. The intraprofessional systems of the bar must succeed in regulating attorney advertising in order to quell the fears espoused by Chief Justice Burger and the other dissenters in *Bates*.

II. ATTORNEY SELF-REGULATION OF ADVERTISING

The developments of attorney self-regulation in the United States and of the prohibition against lawyer advertising provide enlightenment on the question of whether intraprofessional regulation of advertising will be sufficient or whether extraprofessional regulatory bodies are likely to intercede.

A. *The Canons of Professional Ethics: Canon 27*

The first code of professional ethics in the United States was developed in 1887 in the state of Alabama.⁸³ This bar association's action touched off a flurry of similar activity in the rest of the states, culminating with the adoption of the thirty-two Canons of Professional Ethics by the American Bar Association in 1908.⁸⁴ The stimulus of the sudden demand for a code of ethics seemed to stem from a growing commercialism, which had been detrimental to the profession's image.⁸⁵

Canon 27, the original canon proscribing advertising, stated that "[t]he most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct"⁸⁶ The language of the canon was revised completely in 1937 to allow advertising in an approved law list and was amended in later years, enlarging the categories of information that could be included in the lists.⁸⁷ Other canons were subsequently added to define more clearly the

83. H. DRINKER, *LEGAL ETHICS* 23-24 (1953).

84. *Id.* ABA CANONS OF PROFESSIONAL ETHICS [hereinafter cited as ABA CANONS].

85. DRINKER, note 83 *supra*, at 25.

86. ABA CANONS No. 27 (1908), reprinted in DRINKER, note 83 *supra*, at 316-17 n.6 [hereinafter cited as CANON 27].

87. Francis & Johnson, *The Emperor's Old Clothes: Piercing the Bar's Ethical Veil*, 13 WILLAMETTE L.J. 221, 227 (1977) (citing DRINKER, note 83 *supra*, at 316-17). CANON 27 was revised in 1940, and again in 1942, 1943, 1951, and 1963. The 1951 amendment recognized patent and trademark law, as well as admiralty, as specialty areas that could be advertised on letterheads and in law lists. *Id.*

bounds of Canon 27.⁸⁸ Before revision in 1940, the language of the canon stated that “[i]ndirect advertisements for professional employment . . . offend the traditions and lower the tone of our profession and are reprehensible.”⁸⁹

B. The Code of Professional Responsibility: Canon 2 and the Bates Decision

When the ABA Canons were replaced by the ABA Code of Professional Responsibility in 1969, some of the advertising restrictions from Canon 27 appeared in Disciplinary Rule 2-101(A) of the new Code.⁹⁰ In February 1976, the ABA modified Disciplinary Rule 2-102(A)(6) to allow a lawyer to publish in the yellow pages of the telephone directory his field of concentration, if any, and, if state law allowed, his legal specialty.⁹¹ For the first time, an attorney was permitted to include any fees charged for initial consultation, the availability upon request of a written schedule of fees, estimates of fees charged for a specific purpose, and whether credit arrangements were available.⁹²

The monumental breakthrough came in *Bates*. The Arizona Bar argued that advertising would “bring about commerciali-

88. See Francis & Johnson, note 87 *supra*, at 221, 226-27.

89. CANON 27 (1951), reprinted in DRINKER, note 83 *supra*, at 316-18. Indirect advertising was defined in CANON 27 as “furnishing or inspiring newspaper comments . . . in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of interest involved, the importance of the lawyer’s position, and all other like self-laudation” DRINKER, note 83 *supra*, at 317-18.

90. DR 2-101(A) (1970):

A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, “public communication” includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.

91. DR 2-102(B)(6) (1976); see also Smith, *Making the Availability of Legal Services Better Known*, 62 A.B.A.J. 855 (1976); *Code Amendments Broaden Information Lawyers May Provide in Law Lists, Directories, and Yellow Pages*, 62 A.B.A.J. 309 (1976); *Legal Profession is Considering Code Amendments to Permit Restricted Advertising by Lawyers*, 62 A.B.A.J. 53 (1976). Other sources called for the extension of advertising beyond the yellow pages, so that attorneys could become more responsive to public needs. Freedman, *Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility*, 4 HOFSTRA L. REV. 183, 197 (1976); Hobbs, *Lawyer Advertising: A Good Beginning but Not Enough*, 62 A.B.A.J. 735 (1976). Before *Bates* confronted the Supreme Court, only Pennsylvania and Michigan had adopted the “yellow page” amendment. See Moskowitz, *The Great Ad Venture—The Legal Marketplace After Bates and O’Steen*, 7 JURIS DOCTOR 15 (Sept. 1977).

92. DR 2-102(A)(6) (1976).

zation, undermine the lawyer's sense of dignity and self-worth and tarnish the image of the profession."⁹³ The Supreme Court replied by citing Ethical Consideration 2-19 of the ABA Code, which calls for the mutual agreement between the attorney and client on the basis of the fee to be charged.⁹⁴ For the majority, Justice Blackmun pointed out that the attorney-client relationship was already a commercial one.⁹⁵ Engineers and bankers advertise, and their professional dignity has not been undermined.⁹⁶

It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: they will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system.⁹⁷

Justice Blackmun challenged the traditional belief that advertising would have the undesirable effect of stirring up litigation and cited the results of a survey conducted by the American Bar Foundation, showing that "the middle 70%" of the American population is neither being reached nor served by the legal profession.⁹⁸ Another survey, referred to in the Court's decision, indicated that "35.8% of the adult population has never visited an attorney and another 27.9% has visited an attorney only once."⁹⁹ The Court approved of any rule permitting restrained advertising as commensurate with the bar's obligation, specified in Ethical Consideration 2-1 to "facilitate the process of intelligent selection

93. 97 S. Ct. at 2701.

94. ABA CODE ETHICAL CONSIDERATION 2-19 (1970) [hereinafter cited as EC 2-19], cited in *Bates*, 97 S. Ct. at 2701.

95. 97 S. Ct. at 2701.

96. *Id.*

97. *Id.* at 2707.

98. 97 S. Ct. at 2705 (quoting American Bar Association, Revised Handbook Prepaid Legal Services: Papers and Documents Assembled by the Special Committee on Prepaid Legal Services 2 (1972)).

99. 97 S. Ct. at 2705 n.33 (citing survey conducted by ABA Special Committee to Survey Legal Needs in collaboration with the American Bar Foundation, reprinted in 3 *Alternatives: Legal Services & the Public* 15 (1976)). See also B. Curran & F. Spalding, *The Legal Needs of the Public* 96 (1974), cited in 97 S. Ct. at 2705 n.33 for an earlier report concerning the preliminary release of some of the results of the survey mentioned by the *Bates* Court.

of lawyers, and to assist in making legal services fully available."¹⁰⁰

In response to the *Bates* decision, the ABA adopted a revised Canon 2 that authorizes both print and radio advertisements, but does not permit television advertising. The immediate reaction to the new Canon 2 was explosive. Consumer groups and the Department of Justice objected to both the amendment to the canon and to a second approach, not adopted, but submitted to the states for consideration as an alternative plan.¹⁰¹ The adopted plan was more objectionable to both groups than was the proposed alternative.¹⁰² Former Texas State Bar President Leroy Jeffers asserted that the amendment was "'permissive, and not prohibitive,' and goes 'far beyond what the Supreme Court requires'" in attorney advertisements.¹⁰³ Several delegates to the ABA meeting that adopted the new canon expressed reservations about potential first amendment problems, since the adopted guidelines attempt to restrict ad content.¹⁰⁴

There has been much speculation about the course of professional self-regulation in advertising and about the state bar associations' resources to ensure the free flow of attorney advertising. In June 1970 the ABA Special Committee on Evaluation of Disciplinary Enforcement, popularly known as the Clark Committee, reported "'the existence of a scandalous situation.'"¹⁰⁵ The committee discovered that lawyers displayed apathetic-to-hostile attitudes towards disciplinary enforcement.¹⁰⁶ Thirty-six specific

100. 97 S. Ct. at 2705 (citing EC 2-1).

101. ABA Press Release, Aug. 19, 1977 (on file in South Carolina Law Review Comments Office). The plan adopted was termed "Proposal A" and was considered regulatory, while the alternative plan, "Proposal B," was considered directive. 46 U.S.L.W. 1, 2 (Aug. 23, 1977).

102. *Id.*

103. *Id.* (quoting Leroy Jeffers, former president of Texas State Bar).

104. *Id.* EC 2-9 mentions, among other things, that representations concerning the quality of service and inclusion of information relevant to selecting a lawyer could be deceptive because of the lack of sophistication on the part of many members of the public concerning legal services. See generally 97 S. Ct. at 2705 n.33; Note, *Advertising, Solicitation, and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1191 (1972).

105. Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 194 n.6 (1974) (quoting ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (June 1970) [Clark Committee Report]).

106. *Id.* "'Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.'" *Id.*

problems were found to exist within the usual system for lawyer discipline, ranging from inadequate financing of disciplinary agencies for investigations and the conduct of proceedings to reluctance on the part of lawyers and judges to report instances of professional misconduct.¹⁰⁷ The committee recommended reformation of the disciplinary structures of the states to provide "more centralization, greater power and swifter action."¹⁰⁸

In response to the Clark Committee Report, the ABA established a Standing Committee on Professional Discipline and a National Center for Professional Discipline to "promote effective disciplinary enforcement in the United States."¹⁰⁹ The committee and the center provide consulting services and training programs for individual lawyers and disciplinary agencies and also furnish informational materials on lawyer discipline.¹¹⁰ As a result, many state disciplinary jurisdictions have adopted rules similar to those recommended by the Clark Committee.¹¹¹ In addition, the Watergate chain of events appears to have spurred the appointment of laypersons to the state disciplinary committees.¹¹² After the establishment of the standing committee and the center, disciplinary action increased 85% between 1973 and 1975.¹¹³

Although the Clark Committee Report has apparently stimulated many procedural reforms at the state level, it has been questioned whether the reforms will actually affect the profession's hesitancy to inform on its own, and whether it will be more likely that an ethical infraction once reported will result in disciplinary action against the malefactor. A summary of disciplinary statistics furnished by the Standing Committee on Professional

107. Rochester, N.Y. Record, May 2, 1977, at 2A. See generally Marks & Cathcart, note 105 *supra*.

108. ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT, note 105 *supra*, at 3. For 14 of the significant recommendations in the Clark Committee Report, see Appendix A-C (summary of disciplinary statistics furnished by the ABA Standing Committee on Professional Discipline, through the Center for Professional Discipline, to the Administrative Office of the Chief Justice for use in his Year-End Report to the United States Supreme Court), cited in Rochester, N.Y. Record, note 107 *supra*, at 8A.

109. Rochester, N.Y. Record, note 107 *supra*, at 2A.

110. *Id.*

111. *Id.* at 8A. See Appendix C, Table 3.

112. Rochester, N.Y. Record, note 107 *supra*, at 8A. See Appendix C, Table 4. Twelve states have added nonlawyer representation to their disciplinary boards as of May 2, 1977. *Id.*

113. Rochester, N.Y. Record, note 107 *supra*, at 8A. See Appendix A, Table 1.

Discipline indicates that disciplinary activity has increased;¹¹⁴ however, the figures do not indicate whether there has been a percentage increase in the number of lawyer complaints about fellow lawyers. Although one might argue that an increase in disciplinary measures from whatever source is commendable, only the most obvious violations tend to be reported by the public. Thus, it is not certain whether the ability of lawyers to originate their own disciplinary measures has, in fact, improved since the Clark Committee Report. Out of 33,007 complaints filed against lawyers in state level disciplinary agencies in 1975, only 693 lawyers were publicly disciplined.¹¹⁵ This figure amounted to an average of 47.6 complaints per instance of discipline imposed.¹¹⁶

While the states have made significant strides in their disciplinary procedures since the Clark Committee Report, the established disciplinary mechanisms may be insufficient to protect attorney advertising in everyday practice. Justice Powell, dissenting in *Bates*, addressed this issue; “[i]n view of the sheer size of the profession, the existence of a multiplicity of jurisdictions, and the problem inherent in the maintenance of ethical standards even of a profession with established traditions, the problem of disciplinary enforcement in this country has proven to be extremely difficult.”¹¹⁷

Future violations of advertising regulations will be distinctly visible in the legal community. If lawyers attempt to advertise beyond the limits of the *Bates* mandate and the new Disciplinary Rules, the number of complaints to the local grievance committees would probably increase. Many jurisdictions have improved their procedures for handling complaints since 1970,¹¹⁸ yet the increased number of complaints could well baffle the existing systems to the point of causing borderline ethical violations to be ignored. Since the ratio of 47.6 complaints to one instance of public discipline could increase, the overall efficiency of the disciplinary structure could be impaired. As a result, fewer attorneys could be disciplined for any ethical violation.

114. See Appendix B, Table 2.

115. *Id.*

116. *Id.* Neither the number of groundless complaints nor private reprimands is reflected in these figures.

117. 97 S. Ct. at 2715 (Powell, J., concurring in part, dissenting in part).

118. Rochester, N.Y. Record, note 107 *supra*, at 2A.

Further, antitrust litigation has increased the potential for regulation of the legal profession. In *Goldfarb v. Virginia State Bar*,¹¹⁹ a suit brought by an attorney, the Court suggested that the legal profession was not unconditionally exempt from the Sherman Act.¹²⁰ Studies conducted by Ralph Nader have indicated that lawyer self-regulation has served the public poorly and that the organized bar has been labeled as primarily interested in preserving its "own profitable domain."¹²¹ The experience of the patent bar provides some insight; advertising by patent lawyers was allowed until 1952 under the supervision of the Patent Office.¹²² Apparently, a mere two to four percent of the total number of patent attorneys had participated in the advertising.¹²³ Unfortunately, however, the Patent Office was unable to control abuses of the activity and totally banned advertising in 1959.¹²⁴

As public concern swells with evidence in the future of inadequacies in the systems established for attorney self-regulation, the intraprofessional assurances of the free and clean flow of advertising might some day be predominantly assisted by extraprofessional regulatory bodies.

III. CONSIDERATION OF OUTSIDE FORCES INFLUENCING SELF-REGULATION BY THE PROFESSION

In the wake of the *Bates* decision, the bar must reformulate Canon 2 to provide for effective regulation of public advertising by the profession. But at the outset of this revision, the bar is faced with two opposing trends that dictate opposite approaches to be taken in the formulation of rules governing lawyer advertising. The first of these is the trend to subject the bar to increasingly greater outside regulation to break down the exclusive domain of self-regulation. This has come in the form of court decisions, which have subjected the procedures and ethical canons of the bar to closer constitutional scrutiny, and from attacks on the bar under the antitrust laws. To confirm the natural development of this trend, the organized bar should attempt to exercise very

119. 421 U.S. 773 (1975). See Section III *infra*.

120. *Id.* at 787-88. See also Wall St. J., Aug. 17, 1977, at 1, col. 1.

121. Wall St. J., Aug. 17, 1977, at 1, col. 1 (citing Ralph Nader group, Public Citizen, Inc.).

122. Hobbs, note 91 *supra*, at 737.

123. *Id.*

124. *Id.*

loose controls over the individual attorney in the regulation of legal advertising.

But another factor must be considered, which dictates an opposite approach to the revision of Canon 2, and that is the influence of the Federal Trade Commission. It is ironic that the FTC, itself an outside regulatory agency, should represent an influence calling for tight controls over individual attorneys in reformulating the rules for self-regulation of the profession. But with *Bates*, the legal profession has entered the world of public advertising. This area of commerce has been the subject of federal regulation for many years, independent of any consideration of attorney self-regulation.¹²⁵ This is not a case of an outside regulatory force trying to penetrate the walls of professional self-regulation. The profession has instead been thrust outward into an area where the boundaries, standards, and policies have already been defined and developed by a federal regulatory agency. The law in this area has developed in its own direction, and the legal profession must take that law as it finds it and adapt itself accordingly. To conform to the law of advertising, as it has developed under the FTC, the organized bar should attempt to exercise very tight controls over the individual attorney in the regulation of legal advertising.

A real dichotomy is present in the approaches the bar must consider in reformulating Canon 2. The purpose of part III is to outline and define further the elements of these diametrically opposed forces that must influence the bar in formulating rules for the regulation of professional advertising.

A. Constitutional Issues and Antitrust Laws: Forces Calling for a Non-Restrictive Approach to Lawyer Advertising

There was a time when the federal courts left the regulation of the legal profession to the state courts and the bar associations with very little interference. This deference to state courts and bar associations recognized a presumption in favor of the interests of the states in regulating the legal profession over the consideration of the individual rights of the regulated lawyer. This resulted in a different standard being applied to evaluate the constitutional rights of lawyers as compared to those of other citizens. An

125. The Federal Trade Commission Act, 15 U.S.C. §§ 41-77 (1970) was enacted in 1914.

example of this dual standard was the 1945 case *In re Summers*¹²⁶ in which the Supreme Court affirmed an Illinois decision denying admission to the state bar on grounds that the applicant's religious beliefs were inconsistent with the Illinois State Constitution. Summers was a pacifist, and the state constitution included a provision requiring service in the state militia if the state were threatened by invasion. Since admission to the bar included an oath to support the state constitution, which the bar believed Summers could not take in good conscience, Summers was denied admission to the Illinois bar, despite the religious freedom guarantees of the first amendment. Those guarantees were recognized in the Selective Service and Training Act¹²⁷ by making allowances for conscientious objectors during wartime,¹²⁸ but the Illinois State Constitution had no such provisions. In effect, Summers had the right to religious freedom in his role as citizen/U.S. soldier but not in his role as citizen/Illinois lawyer.

Over the past twenty years, however, this inequality of standards has been adjusted through a series of Supreme Court decisions. In 1957, the Court began to scrutinize possible violations of the individual rights of lawyers more closely. This closer scrutiny resulted in major changes in both the procedures and policies by which the profession regulated itself. It is important to note that these changes were brought about as a result of Supreme Court rulings, rather than by internal decisions regarding provisions for self-regulation.

The policies and procedures relating to admission to the bar were the first areas of regulation to receive closer constitutional scrutiny by the Court. The 1957 companion cases of *Schwartz v. Board of Bar Examiners*¹²⁹ and *Konigsberg v. State Bar of California*¹³⁰ mark the beginning of a more probing analysis of the state interest involved in relation to the regulation being imposed. Both cases involved denial of admission to the practice of law based on implications of Communist Party connections. The Court stated that although the states had a right to require high standards of qualification for admission to the bar, there must be

126. 325 U.S. 561 (1945).

127. Selective Service and Training Act of 1940, Pub. L. No. 76-783, ch. 720, 54 Stat. 885 (1940).

128. *Id.*

129. 353 U.S. 232 (1957).

130. 353 U.S. 252 (1957) [hereinafter *Konigsberg I*].

a rational connection between these qualifications and the applicant's fitness or capacity to practice law. A qualification of good moral character is a legitimate standard, but there was no evidence that these rejected applicants had failed to meet that standard.¹³¹ That the right to practice law was entitled to due process protection was established in 1867.¹³² But in *Schwartz* and *Konigsberg I*, the Court went beyond the simple requirements of notice and hearing in examining the regulation of the profession and due process rights. The Court looked inside the procedure itself to examine whether fundamental fairness had been preserved in determining whether or not the applicant met the standards set by the state regulation.

Although these two cases marked the beginning of the closer scrutiny approach, they did not establish a pattern. In considering constitutional challenges to bar practices other than those based on first amendment grounds, and even first amendment challenges prior to 1963, the Court was reluctant to go beyond the surface in testing the validity of state interests involved in regulation of the profession. For instance, *Konigsberg* was ultimately denied admittance to the California bar in 1961. In *Konigsberg II*,¹³³ the Supreme Court upheld his rejection on the basis that his refusal to answer questions regarding possible Communist sympathies was a valid ground for rejecting his application. The identical state interest was involved as that in *Konigsberg I*: the assurance that only persons of good moral character be admitted to the bar. But in this case, the Court held that *Konigsberg's* refusal to answer questions constituted an obstruction of the proceedings of the investigating committee, which were necessary to protect that valid state interest. This same obstruction-of-necessary-proceedings argument was used to determine the identical issue in the companion case *In re Anastalpo*,¹³⁴ despite ample evidence that not only was *Anastalpo* not a Communist sympa-

131. Justice Black, writing for the majority in both cases, made the point in *Konigsberg I* that good moral character does not mean that the applicant must have orthodox political views (353 U.S. at 263-64) and in *Schwartz*, that conduct twenty years earlier does not necessarily cast doubt on the applicant's present moral character (353 U.S. at 242-43).

132. *Ex parte Garland*, 71 U.S. 366 (1867). The Court held that an attorney could only be removed from the profession "for misconduct ascertained and declared by the judgment of the Court after opportunity to be heard has been afforded." *Id.* at 367.

133. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961).

134. 366 U.S. 82 (1961).

thizer, but his refusal to answer questions resulted from a philosophical disagreement between Anastalpo and certain members of the committee.¹³⁵ In both *Konigsberg II* and *Anastalpo*, the first amendment right of freedom of association was subordinated to the state interest of insuring that only persons of good moral character be admitted to the bar without a close examination by the Court as to whether that interest was actually being served by the regulatory practice involved.

The fact that these cases represent a break in any pattern that might have been set in *Schware* and *Konigsberg I* is important in considering the stance of the organized bar in relation to later court decisions. *Konigsberg II* and *Anastalpo* gave the Court's stamp of approval to the practice of denying applications to the bar based on a refusal to answer questions asked by an investigating committee. Refusal alone was enough, regardless of whether or not that refusal actually resulted in a frustration of the valid goals of the state interest involved. And even though later decisions in other areas regularly gave pre-eminence to first amendment rights over the regulatory interests of the organized bar, this practice continued until it was expressly declared unconstitutional in 1971.¹³⁶ This ten year delay in changing an internal policy is indicative of the general tendency of the organized bar to change only so much of its regulatory processes as is specifically required by Supreme Court decisions.

The same pattern can be seen in the area of a lawyer's fifth amendment right against self-incrimination. In *Cohen v. Hurley*,¹³⁷ another 1961 case, the Court held that the fourteenth amendment did not forbid the state from making an attorney's refusal to answer questions from an inquiry board per se grounds for disbarment, even if the refusal rested on a bona fide claim of privilege against self-incrimination. Although this case was decided before *Malloy v. Hogan*,¹³⁸ which extended the application of the fifth amendment to the states through the fourteenth amendment for citizens generally, *Cohen* was not expressly over-

135. *Id.* at 97-116. The long dissent by Justice Black gives considerable detail about the various meetings between Anastalpo and the Committee, quoting from the record of those meetings in several places, and the evidence—or lack of it—that determined the Committee's decision to reject Anastalpo's application.

136. *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971) (applicant refused to answer questions about possible association with the Communist Party).

137. 366 U.S. 117 (1961).

138. 378 U.S. 1 (1964).

ruled by *Malloy* in specific language. The result was that the bar continued to enforce disbarment on the basis of *Cohen*, distinguishing the case from *Malloy* in that *Malloy* was not a member of the bar and that investigative committee hearings were not state criminal actions. It took another Supreme Court decision,¹³⁹ three years after *Malloy*, to extend fifth amendment protection expressly to lawyers involved in disciplinary proceedings.

This pattern of resistance to change in the policies and procedures of the organized bar continued even after the Canons of Professional Ethics themselves began to fall under first amendment scrutiny. The reaction of the bar to Supreme Court decisions affecting the bar's internal regulation has been to alter its approach to conform only to the extent that it must, ignoring later analagous court decisions, until the Supreme Court again addresses a specific question and rules directly on that particular practice or policy. Although a conservative approach is a normal pattern for court-determined expansions of individual rights in general,¹⁴⁰ it is somewhat contradictory to the concept of professional self-regulation. It is difficult to contend that the legal profession is one that regulates itself when the major changes in that regulatory effort come in the form of Supreme Court orders for change, rather than from the internal mechanisms and processes of the profession.

Just as in the case of internal bar procedures, there was a time when the Canons of Professional Ethics were accepted by both the bar and the courts as the primary authority for the regulation of the profession. In 1955, for example, the Canons were cited as controlling law for the decision of cases.¹⁴¹ Fact situations were examined in light of the precepts of the Canons, and rights of attorneys were determined accordingly. But in the 1963 case of *NAACP v. Button*,¹⁴² the Supreme Court was confronted with a situation in which the Canons were directly chal-

139. *Spevak v. Klein*, 385 U.S. 511 (1967).

140. *Cf., e.g., Betts v. Brady*, 316 U.S. 455 (1942); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (cases illustrating the development of the right to counsel in criminal prosecution).

141. *See, e.g., Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 239 F.2d 555 (2d Cir. 1956), *cert. denied*, 355 U.S. 824 (1957); *Laskey Bros., Inc. v. Warner Bros. Pictures, Inc.*, 224 F.2d 824 (2d Cir. 1955); *Consolidated Theatres v. Warner Bros. Cir. Mgmt. Corp.*, 216 F.2d 920 (2d Cir. 1954); *United States v. Standard Oil Co.*, 136 F. Supp. 345 (S.D.N.Y. 1955).

142. 371 U.S. 415 (1963).

lenged on first amendment grounds. Specifically, Canons 35 and 47,¹⁴⁴ dealing with solicitation, were under attack. The Canons of Professional Ethics had been adopted by the Supreme Court of Virginia and incorporated into the rules of court. Chapter 33 of the Virginia Code, which included Canons 35 and 47, was the basis for charges of criminal solicitation against the NAACP and its legal staff. This legal staff was maintained for the purpose of advising the members of the NAACP of their legal rights and assisting them in exercising those rights through the courts. In this landmark decision, the Court found that chapter 33 of the Virginia Code, and therefore Canons 35 and 47, was unconstitutionally overbroad. The activities of the NAACP and its legal staff were modes of expression and association and, therefore, fell under the protection of the first amendment. The state of Virginia could not prohibit this activity through its authority for regulating the legal profession by calling it improper solicitation of legal business. By way of footnote, the Court made a significant comment that reflected a change in attitude as to the status of the Canons in the scheme of authority over the actions of attorneys:

It is unclear—and immaterial—whether the Virginia court's opinion is to be read as holding that NAACP's activities violated the Canons *because* they violated Chapter 33, or as reinforcing its holding that Chapter 33 was violated by finding an independent violation of the Canons. Our holding that petitioner's activities are constitutionally protected applies equally whatever the source of Virginia's attempted prohibition.¹⁴⁵

143.

CANON 35. INTERMEDIARIES

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigent are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs. (As amended 8/31/33).

144.

CANON 47. AIDING THE UNAUTHORIZED PRACTICE OF LAW

No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate. (Adopted 9/30/37).

145. 371 U.S. at 429 n.11.

Evidently refusing to accept the Court's position, the bar continued to litigate the same issue in similar situations in 1964¹⁴⁶ and again in 1967,¹⁴⁷ in cases involving attempts by labor unions to provide legal services to their members. Each case ended with the same result. The state interest involved, the protection of the integrity of the profession, simply did not outweigh the individual rights of freedom of association and expression that were encroached upon by the regulation. These rulings, combined with the weakening of procedural policies discussed earlier, led to the revision of the Canon of Professional Ethics.¹⁴⁸ The resulting Code of Professional Responsibility was more detailed and specific than its predecessor. But the new Code has not been immune from attack. As shown by *Bates*, the first time the Supreme Court has had reason to weigh the state interest embodied in the Code against first amendment rights, the first amendment protection weighs heavier in the balance. But there are indications in the *Bates* decision that the Court may be softening in its approach to this conflict between state interests and constitutional rights in regulating the legal profession. The *Bates* decision was delivered in limiting terms. This is quite different from the broad announcements that effectively abolished the old Canons 35 and 47.¹⁴⁹ Also, the Court weighed very carefully the legitimate values that must be considered, rather than declaring the sanctity of the first amendment in absolutist terms. And the Court has clearly left the formulation of new rules for regulating lawyers advertis-

146. *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964) (union program for advising injured workers to seek legal counsel, recommending specific lawyers).

147. *UMW, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (union hired attorney on salaried basis to assist members in processing workmen's compensation claims).

148. See generally Preface to ABA Code.

149. *UMW, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964); and *NAACP v. Button*, 371 U.S. 415 (1963) were all premised on the supremacy of the first amendment right of assembly over any state interest in regulating the legal profession. The Court made the statement in *United Mine Workers* that:

We start with the premise that the rights to assemble . . . are among the most precious of the liberties safeguarded by the Bill of Rights. . . . We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.

389 U.S. at 222.

ing to the bar, indicating that the majority, at least, has some measure of confidence that the bar is capable of reconciling the previous conflict between state interest and first amendment rights in formulating the new rules. In effecting this reconciliation, however, the bar must take into consideration the presumption that the Court has developed in favor of individual rights in the balancing process, and it must provide rules for lawyer advertising that do not infringe on protected rights. This consideration would indicate that the bar should avoid taking a restrictive approach in formulating the new rules, since specific restrictions are more likely to offend first amendment rights.

In addition to the consideration of constitutional issues, there is another influence that suggests that the bar should avoid a restrictive approach, and that is the impact of antitrust laws on the legal profession. The area in which the courts first hinted at possible antitrust application to the regulation of the bar was in connection with the enforcement of Canon 4 of the Code, which deals in part with conflicts of interest. An attorney has access to confidential information from his clients and, therefore, should not engage in litigation against a former client, according to Canon 4. The fact that this canon was never made an object of a Justice Department attack under the antitrust laws is possibly due to changes the courts made in the test to be used in the application of Canon 4.

The predecessors of Canon 4 of the Code were the old Canons 6¹⁵⁰ and 37,¹⁵¹ which were the controlling authority for the disqual-

150.

CANON 6. ADVERSE INFLUENCES AND CONFLICTING INTERESTS

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed. (Adopted 8/27/08).

151.

CANON 37. CONFIDENCES OF A CLIENT

It is the duty of a lawyer to preserve his client's confidences. This duty

ification of plaintiffs' attorneys in several antitrust suits brought during the 1950's against the motion picture industry.¹⁵² One attorney, Malkan, was disqualified in no less than three suits of this kind.¹⁵³ The test used for determining whether his representation of the plaintiff constituted a conflict of interest was a mechanical match-up of time periods and legal associations. The fact that a former partner had been associated with another firm at a time when the defendants were represented by that firm, served to disqualify Malkan, the former partner, and a subsequent partner from prosecuting claims against those defendants several years later. There was an irrebuttable presumption in such cases that confidences were exchanged during each association.¹⁵⁴ The

outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened. (As amended 9/30/37).

152. See, e.g., *Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 239 F.2d 555 (2d Cir. 1956), cert. denied, 355 U.S. 824 (1957); *Fisher Studio v. Loew's Inc.*, 232 F.2d 199 (2d Cir. 1955); *Laskey Bros., Inc. v. Warner Bros. Pictures, Inc.*, 224 F.2d 824 (2d Cir. 1955); *Consolidated Theatres v. Warner Bros. Cir. Mgmt. Corp.*, 216 F.2d 920 (2d Cir. 1954).

153. *Harmar, Fisher, and Laskey*, note 152 *supra*.

154. Malkan was a practicing attorney who took on a younger partner named Isacson in 1952. Isacson had formerly been employed by the firm of Sargoy & Stein, who had as clients many of the motion picture companies. The firm of Malkan & Isacson filed suit in the *Fisher* case, but both were disqualified because of Isacson's former association with Sargoy & Stein. The Malkan & Isacson partnership was dissolved, and Malkan formed a new partnership with Mr. Ellner. The partnership of Malkan & Ellner filed the *Laskey*, (and its companion case, *Austin Theater, Inc. v. Warner Bros. Pictures, Inc.*) and *Harmar* suits. Both were disqualified in the *Laskey* suit because the case came to Malkan before the dissolution of the Isacson partnership (knowledge of one partner was imputed to the other so that Malkan was disqualified because of Isacson's possible knowledge, and Ellner was disqualified by the association with Malkan—all of this possible knowledge stemming from possible confidences Isacson might have been exposed to at Sargoy & Stein). Disqualification was not granted in the *Austin* case, though the dissenting opinion felt it was absolutely necessary, because the case came to the Malkan & Ellner firm from channels not connected with Isacson. Disqualification did result in the *Harmar* case because 50% of the plaintiff's corporation was owned by the same family that owned another corporation that had retained Malkan & Isacson at one time. The taint stemmed from that time and continued with the clients even in later, unrelated matters. It was noted that the

change in the test used by the courts in recent years has shifted away from irrebutable presumptions that confidences were gained purely by associations, to a test which includes a closer scrutiny of the facts of each case. The lawyer has the opportunity to rebut the inference that he is in possession of confidential information, and the subject matter of the suit and the issues involved are examined to see if they are substantially related to the former representation.¹⁵⁵

The 1973 case of *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,¹⁵⁶ compared to the Malkan cases, illustrates more than just the difference between associations in a large firm and association in a partnership. The actual test the court applies goes beyond an association analysis and into a facts and evidence analysis. Again, this change in the interpretation of the dictates of Canon 4 has come from court decisions rather than from internal clarification by the bar.¹⁵⁷ This development in Canon 4 cases is important in the consideration of antitrust applications in the regulation of the legal profession because the cases indicate early misgivings by the court that the effect and operation of Canon 4 has antitrust overtones. In a dissenting opinion to one of the Malkan cases, Chief Judge Clark warned against "the dangers of using legal ethics as a club to protect monopolists or harass complainants"¹⁵⁸ and went on to say:

partnership of Malkan & Ellner 'understandably' had dissolved before the appeal of this case was decided, so the order was modified on appeal to disqualify only Malkan personally.

155. *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 370 F. Supp. 581 (D.C.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975) (includes a survey and summary of cases on this issue).

156. 370 F. Supp. 581 (D.C.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

157. When the ABA revised the old Canons, there was opportunity to give some definite guidelines for determining when a conflict of interest in employment exists, or for judging before accepting employment whether a conflict is likely to occur; but this was not done. Ethical Consideration 4-5 includes one sentence for the lawyer's guidance on this issue: "Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure." Note 7 refers the reader to an ABA Opinion from 1936 that is little more instructive as to what a lawyer is to consider when accepting clients: "[A]n attorney must not accept professional employment against a client or a former client which will, or even may require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of the employment" ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 165 (1936).

158. *Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 239 F.2d 555, 559 (2d Cir. 1956), *cert. denied*, 355 U.S. 824 (1957).

The only definite sameness [in the cases and defendants in issue] I find is that all start with the famous Paramount decree. But so does all litigation in this area at the present time. In short what this decision really means is that Malkan is barred from this profitable area of antitrust litigation for the foreseeable future.

. . . .

I find the result here quite unfair to young lawyers attempting to break into substantial practice and undesirable in policy as helping to safeguard monopoly.¹⁵⁹

In *Silver*, United States District Court Judge Weinstein was more direct in stating a possible relationship between the operation of Canon 4 and antitrust problems. He observed that the practice of law is one of the few remaining professions in which young people can begin a career without substantial initial capital. With the growth of large firms and the trend to specialization, a strict application of the rule would be unnecessarily restrictive on new lawyers. A starting lawyer's future could be severely restricted by associating with large firms early in his career.

Antitrust implications in unduly restricting the work of the largest law firm's former associates are not insubstantial since these firms have as clients corporations that control a major share of the American economy. . . . Large law firms may not protect their clients by monopolizing young talent. The Canons of Ethics furnish no warrant for illegal restraints on trade.¹⁶⁰

The United States Court of Appeals affirmed Judge Weinstein's ruling in *Silver*, but disagreed by way of footnote with the antitrust comment.

We cannot endorse Judge Weinstein's comments . . . pertaining to the possible antitrust implications of limitations on the ability of associates to represent interests opposing clients of former firms. The Supreme Court presently has pending before it a question of the Sherman Act's application to the legal profession and, in particular, minimum fee schedules. *Goldfarb v. Virginia State Bar*, No. 74-70 [420 U.S. 944, 95 Sup. Ct. 1323, 43 L. Ed. 2d 422] (argued April 1, 1975). Whatever the decision in that case, we would think it inappropriate to relax ethical standards directed at preserving a sound attorney client rela-

159. *Id.* at 559-60.

160. 370 F. Supp. at 591.

tionship in the name of the antitrust laws. As long as the "substantially related" test is employed, we perceive no conflict between the two.¹⁶¹

The point should be emphasized that the appellate court sees no conflict between Canon 4 and antitrust laws "[a]s long as the 'substantially related' test is employed." The court does not say that it finds no conflict at all. Judge Weinstein's comments may have been prophetic, however, in that *Goldfarb v. Virginia State Bar*¹⁶² did establish that the legal profession was not exempt from application of the Sherman Act.

In *Goldfarb*, the plaintiffs brought a class action against the Virginia State Bar and the Fairfax County Bar Association as co-conspirators in the formulation and enforcement of a minimum fee schedule for common legal services in violation of section 1 of the Sherman Act.¹⁶³ The plaintiffs needed a title search in order to purchase a home in Fairfax County and, by Virginia law, only a member of the state bar could legally perform this service.¹⁶⁴ After sending inquiries to thirty-seven Fairfax County lawyers, the plaintiffs were unable to find one lawyer who would charge less than the minimum rate fixed by the fee schedule. The legal profession clearly had a monopoly on title searches, and there was obvious agreement among members of the profession that there would be a minimum fee for providing this service, but the bar argued that the Sherman Act did not apply to the legal profession. The Supreme Court found for the plaintiffs and held that the minimum fee schedule was a form of price fixing in violation of the Sherman Act.

There were three arguments put forth in *Goldfarb* for the contention that this action by the bar was exempt from the application of the Sherman Act. The first was that the antitrust laws only apply to restraints on trade or commerce. The practice of law is a profession and, by definition, professions are not engaged in trade or commerce; therefore, the Sherman Act does not apply to the legal profession. The second argument was that the Sherman Act applies only to restraints on trade or commerce that affect interstate commerce. A title search is a local service, an intrastate

161. 518 F.2d at 757-58 n.9.

162. 421 U.S. 773 (1975).

163. 15 U.S.C. §§ 1-7 (1970).

164. Unauthorized Practice of Law, Opinion No. 17, Aug. 5, 1942, Virginia State Bar—Opinions 239 (1965), cited in *Goldfarb v. Virginia State Bar*, 421 U.S. at 775 n.1.

activity, not interstate commerce. The third argument was that the state action exemption of *Parker v. Brown*¹⁶⁵ would prevent the legal profession from being subject to antitrust attack because the regulation of individual lawyers is ultimately in the hands of the state courts. These rules and procedures of the bar have no enforceable validity unless adopted or approved by the state supreme courts. The court then delegates administrative duties to the bar for enforcement of those rules, so that the bar is acting as a state agency under the direction of the court in its enforcement procedures. All three arguments were rejected by the Court in *Goldfarb* on the facts of that case.

The first argument was rejected by pointing out that the language of section 1 of the Sherman Act contains no exceptions at all, and that there was nothing in the legislative history of the Act to support a contention that Congress did not intend to include learned professions within the terms "trade or commerce." As to the particular legal service the profession was providing in this case, "[w]hatever else it may be, the examination of a land title is a service; the exchange of such a service for money is 'commerce' in the most common usage of that word."¹⁶⁶

The second argument was rejected by the Court on the basis that the title search was a practical necessity in buying property because all lenders require title searches as assurance of a lien on a valid title before they provide financing. This results in the title search being generally an inseparable part of a real estate transaction. Real estate transactions are a part of interstate commerce in that a significant amount of funds furnished for the purchase of homes in the locality come from outside the state in the form of VA and FHA loans. "Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes."¹⁶⁷

The rejection of the third argument, the state action exemption, involves a more complex analysis, and a review of the state action doctrine is necessary to understand the clarification of that doctrine as represented in *Goldfarb*. In 1943, the Supreme Court decided *Parker v. Brown*, establishing the criterion used for determining whether an activity that was in fact a restraint on trade

165. 317 U.S. 341 (1943).

166. 421 U.S. at 787.

167. *Id.* at 785.

or commerce would, nevertheless, be exempt from the application of the Sherman Act, because the activity was part of some government program or regulation. The Sherman Act did not apply to the actions of government, because the legislative history of the Act indicated that the purpose of the Act was to prevent the economic damage to the public caused by monopolies in the private sector. The presumption is that monopolies created in the private sector are created for the purpose of enhancing the wealth of those who conspire to form the monopoly. Monopolies that are created by government, however, are presumed to be for the purpose of best serving the needs of the people. In *Parker*, the state of California had created an Agricultural Prorate Advisory Commission,¹⁶⁸ which administered programs for marketing agricultural commodities produced in the state, restricting competition among growers and maintaining prices in the sale of those commodities to packers. The plaintiff was a raisin producer who was also a purchaser and packer. Because of the implementation of the prorate system, he was caught in a position of being prevented from marketing a full season's crop of raisins and prevented from fulfilling contract obligations in interstate commerce. He filed the antitrust suit alleging that the program was in violation of the Sherman Act.

The means by which prorate zones were established in the program is important in terms of the later *Goldfarb* decision. A petition is made to the Commission by not less than ten producers requesting that a prorate marketing plan be established for any commodity within a defined production zone. After a public hearing and prescribed economic findings show that such a program for the proposed zone will achieve the desired economic goals of the program, the Commission may grant the petition. The Director of Agriculture is then required to "select a program committee from among nominees chosen by the qualified producers within the zone, to which he may add not more than two handlers or packers."¹⁶⁹ This committee then formulates a proration program for the zone, which the Commission is authorized to approve after a public hearing and a finding that the program is a reasonable one, calculated to meet the objectives of the act. The Commission has the authority to modify the program and

168. California Agricultural Prorate Act, June 5, 1933, ch. 754, § 3, p. 1969, 1933 Cal. Stats., cited in 317 U.S. 341, 344 n.1.

169. 317 U.S. at 346.

approve it as modified. Once the program is approved by the Commission, a referendum is held. If 65% of the producers in the zone, owning 51% of the acreage devoted to the crop being regulated, approve the program, the Director of Agriculture is required to declare the program instituted. Authority to administer the program is delegated to the program committee, subject to approval by the Director. The *Parker* court held that the program was not a violation of the Sherman Act because it was state action and, therefore, exempt from the operation of antitrust laws.

The court reasoned that the program was state action by considering several points. The state has created the machinery for establishing the prorate system through the Agricultural Prorate Act. Although the organization of a zone is proposed by producers, and although any program approved by the Commission must also be approved by a referendum of producers, "it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy."¹⁷⁰ The prerequisite approval by a certain number of producers is not an imposition of their will on a minority by force of argument or combination because "[t]he state itself exercises its legislative authority in making the regulation and prescribing the conditions of its application. The required vote on the referendum is one of those conditions."¹⁷¹

It is understandable that the defendant bar associations in *Goldfarb* reasoned that the state action exemption of *Parker* was analagous to their own situation. By legislative enactment, the Supreme Court of Virginia was authorized to regulate the practice of law in the state.¹⁷² The Virginia State Bar, also by legislative enactment,¹⁷³ was authorized to act as a state administrative agency through which the court implements that regulation. The Code of Professional Responsibility was adopted by the Virginia Supreme Court.¹⁷⁴ Included in the Code, under Canon 2, were provisions determining reasonable fees. EC 2-18 stated that fees vary according to many factors, but "[s]uggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees."¹⁷⁵ Also, DR 2-

170. *Id.* at 352.

171. *Id.*

172. VA. CODE § 54-48 (1972).

173. *Id.* § 54-49 (1972).

174. Rules of Court, 211 Va. 295 (1971).

175. *Id.* at 302.

106(B) listed as one of eight factors to be considered in avoiding excessive fees “[t]he fee customarily charged in the locality for similar services.”¹⁷⁶

The Court held that the actions of the bar in *Goldfarb* did not constitute state action, and the reasoning of the Court in distinguishing the case from *Parker* represents an important development in the state action exemption doctrine. The state bar did not officially require the use of minimum fee schedules by the attorneys of the state as members of the state bar. But it did publish reports by the Committee on Economics of Law Practice which recommended minimum charges for certain services,¹⁷⁷ and it issued ethical opinions that indicated that a lawyer would be disciplined if he ignored the fee schedule adopted by his local bar,¹⁷⁸ even if he were not a member of that local voluntary association. The argument of the state bar in *Goldfarb* was that the issuance of reports and ethical opinions was merely an implementation of the fee provisions of the ethical codes, and that this is a part of its function as a state administrative agency. The county bar argued its action in adopting a fee schedule was prompted by the ethical codes and the ethical opinions of the state bar, and thus its actions should also qualify as state action for Sherman Act purposes. But the Court held:

The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is *required* by the State acting as sovereign. . . . It is not enough that . . . anti-competitive conduct is “prompted” by state action; rather, anticompetitive activity must be *compelled by direction of the State* acting as sovereign.¹⁷⁹

It is significant that the state bar had never taken formal disciplinary action to enforce a fee schedule. If it had, the state supreme court would have had to rule on the disciplinary action taken. The problem in *Goldfarb* was that the required fee schedule was adopted at the county bar level, approved and reinforced at the state bar level, and no direct opinion was ever expressed one way

176. *Id.* at 313.

177. The first such report was published in 1962. In 1969, a revised schedule was published raising the prices for most services.

178. Virginia State Bar Committee on Legal Ethics, Opinion No. 98, June 1, 1960; Virginia State Bar Committee on Legal Ethics, Opinion No. 170, May 28, 1971.

179. 421 U.S. at 790-91 (emphasis added).

or the other by the Supreme Court of Virginia. The authority for the anticompetitive activity was exerted in the reverse direction from that required for the state action exemption to apply to the case.

In 1976, the Supreme Court placed an additional limitation on the use of the state action exemption in *Cantor v. Detroit Edison Co.*¹⁸⁰ The anticompetitive practice complained of was the sale of light bulbs by the power company to its customers at a reduced rate. The state action exemption asserted was the fact that the bulb program was approved as part of the rate structure fixed by the state. The Court held that the state action claimed was, in reality, only acquiescence by the state to a practice that had been going on before state regulation of the power company had begun and, therefore, not an order by the state compelling the power company to provide light bulbs for sale to the public. The real interest of the state was the regulation of the power company as a public utility, and the implied approval of the bulb program was only incidental to the primary regulatory interest of the state.

By the time *Bates* was considered, the state action exemption doctrine had developed into a three-part requirement:

- (1) A state regulation must be present which authorizes the anticompetitive activity;
- (2) That state regulation must directly order and compel the anticompetitive activity to be carried on; and
- (3) The anticompetitive activity must be related to the primary purpose for regulation by the state of the party engaged in such activity.

There was no dissent to the *Bates* holding that the state action exemption of *Parker* did apply to restraints on advertising endorsed and administered by the state bar. This is entirely consistent with the three-part test outlined above. The state regulation was present with the adoption of the Code by the Supreme Court of Arizona. The state regulation did directly compel and order the anticompetitive activity, as witnessed by the very disciplinary action on appeal. And, the restriction on public advertising by lawyers directly related to the regulation of the legal profession by the state. The Court made the point even stronger by expressly characterizing the Arizona Supreme Court as being the

180. 428 U.S. 579 (1976).

real party in interest, not the Arizona Bar, because it is the rules of the court that are being enforced through the administrative machinery of the bar.¹⁸¹

The *Bates* decision apparently rebuffs any attempts by the Justice Department to invalidate the policies of the bar as they are embodied in the Code through antitrust attacks. But it is important to note that the Justice Department filed an amicus curiae brief in *Bates*¹⁸² endorsing the application of the state action exemption of *Parker v. Brown*.¹⁸³ This seems contradictory considering that the Justice Department filed an antitrust action against the ABA in June 1976, alleging that, by recommending its Code of Professional Responsibility rules for regulating lawyer publicity, the ABA was engaging in a conspiracy to restrain competition among lawyers.¹⁸⁴ In the amicus curiae brief, the Justice Department did say that the Arizona rule violated the substantive standards of the Sherman Act, but that it could not be challenged only because the rule was promulgated by the court.¹⁸⁵

The Justice Department has announced its intention to proceed with further antitrust actions including the suit filed in 1976, insisting that the issue has not been mooted by *Bates*, since the focus of the suit is on an alleged private agreement and not state regulation.¹⁸⁶

In making this distinction, the Justice Department recognizes that the organized bar wears two hats at the state level: one as a state agency enforcing the rules of the court and another as an independent professional organization. Perhaps the Justice Department plans to continue litigation under antitrust laws in an attempt to get greater clarification from the courts as to where the demarcation lines fall in distinguishing when the bar is acting as a state agency, as in *Bates*, and when it is acting as a private organization making agreements that are subject to antitrust violations, as in *Goldfarb*. The full range of activities in which the state bars involve themselves are too numerous and too complex for all the questions in this area to have been answered in *Goldfarb* and *Bates*.

181. 97 S. Ct. at 2697.

182. 97 S. Ct. 729 (1977).

183. *Bar Antitrust Problems Still Linger Despite Bates*, 63 A.B.A.J. 1067 (1977).

184. *Id.*

185. *Id.*

186. *Id.*

Another distinction pertinent to the Justice Department action is that the ABA and the state bar organizations are not synonymous entities. While this may be readily apparent when examining internal conflicts or disagreements within the profession, the distinction is not as clear when considering the defenses to be made to attacks from outside the profession. For instance, the defense maintained by the ABA in response to the filing of the June 1976 suit is basically grounded in two doctrines.¹⁸⁷ The first is a variation on the state action exemption doctrine. The ABA does not restrict or prevent advertising, because it has no power to do so. The Code of Professional Responsibility has no enforceable effect on the individual attorney unless it is adopted by the state body responsible for the regulation of the legal profession in his or her state. There is no enforcement of the Code without state action. The second defense is based on the so-called *Noerr* doctrine.¹⁸⁸ The right of an organization to petition government was held to be a right which transcends antitrust considerations in *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*¹⁸⁹ The Supreme Court, in a unanimous decision, held that the Sherman Act has no application to attempts to influence the passage or enforcement of laws and "[s]uch a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."¹⁹⁰ Relying on this doctrine, the ABA contends that its attempts to have the Code adopted in the several states are a protected political activity and not subject to antitrust prohibitions.

The weakness in the first defense is the attempt to ignore the actual focus of the antitrust laws. In an antitrust case the issue is not whether the conspirator has the authority to enforce a restraint on trade or commerce, but whether the actions taken by the conspirator have the effect of restraining trade or commerce.

The weakness of the second defense is directly tied to the previously mentioned distinctions between the ABA and state bar

187. Letter from Lawrence E. Walsh, President of the ABA, to Members of the House of Delegates (June 25, 1976).

188. For a more detailed discussion of the *Noerr* doctrine and its possible application to the legal profession, pre-*Bates*, see Bane, *Truckin' on Down to the American Bar Association or Can Noerr be Ignored?*, 21 ANTITRUST BULL. 629 (1976).

189. 365 U.S. 127 (1961).

190. *Id.* at 138.

organizations. The *Noerr* doctrine shields the right to petition government from the application of the Sherman Act, but is the ABA really involved in the petitioning of government? The Justice Department's position is that it is not. The state bar organizations are involved in petitioning government. The ABA is involved in petitioning the state bar organizations. The question to be answered in future litigation is whether the *Noerr* doctrine will still apply if the restraining activity is once-removed from the actual petitioning of government. In this context, the motivation for the amicus curiae brief in *Bates* begins to make sense. The Justice Department would like to have the distinction between state bar activities and ABA activities as sharply defined as possible before the application of the *Noerr* doctrine is tested in the courts.

The conflict between the concept of self-regulation of the profession and antitrust attacks on the organized bar is far from being resolved. The profession can expect more litigation in the antitrust area in an attempt to settle the rights and the limitations of power on both sides of the conflict.

The combined effect of the constitutional issues discussed earlier in this section and the application of antitrust laws to the legal profession has seriously weakened the authority, ability, and justifications for self-regulation by the legal profession. Now the bar has been given the responsibility of formulating effective rules for regulating lawyer advertising. The ABA and the state bar associations are faced with a complex problem in determining an approach to the formulation of those rules. Even if the *Noerr* doctrine is held to apply to the ABA, it would be unwise to adopt and petition for a plan of regulation that violates first amendment rights of free speech and association. The result would still be a set of regulations that are illegal under either antitrust law or first amendment protections. These considerations dictate that the organized bar take a liberal, unrestrictive approach to the formulation of regulations covering lawyer advertising.

At the same time, another government agency enters into the considerations that the bar must take into account—the Federal Trade Commission. The influence of this agency has more immediate impact on the individual lawyer than do the considerations of constitutional issues and antitrust concerns in relation to the organized bar. For this reason, if no other, the influence of the FTC must be given serious consideration in formulating rules

that will affect the individual attorney so directly in the daily operation of his practice.

B. The Federal Trade Commission: A Force that Calls for a Restrictive Approach Toward Lawyer Advertising

When the Bates and O'Steen advertisement appeared in a newspaper in Arizona, it could be argued that the legal profession technically came under the regulating authority of the FTC. There is no doubt that when the Court ruled that the bar against advertising must be lifted and lawyer advertisements began appearing around the country, the FTC automatically had authority to assume control of the regulation of lawyer advertising. Under the Federal Trade Commission Act,¹⁹¹ Congress has given the FTC broad powers to regulate commercial practices¹⁹² to protect the public from false or misleading advertisements,¹⁹³ and this should apply with equal force to the legal profession.¹⁹⁴ The legal profession has entered the world of advertising, where the FTC has already established the controlling laws. The FTC has the power to formulate Trade Regulation Rules which can be used effectively to regulate the conduct of entire industries.¹⁹⁵ The dis-

191. 15 U.S.C. §§ 41-58 (1970).

192. *Id.* § 45.

193. *Id.* § 52.

194. Section 45(a)(6) of the Act specifies exceptions to the power of the Commission to regulate certain types of business, all of which are subject to regulation by some other federal agency; banks, common carriers, air carriers, and "persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act" are exempt from FTC control. The insurance business was declared exempt from federal regulation in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (1970), but provision was made in § 1012(b) that the FTC Act (and the Sherman and Clayton Acts) would be applicable to the extent that the business is not regulated by state laws. With such specific exceptions made by Acts of Congress, it is obvious that the congressional intent of the FTC Act was that it would apply to all unfair or deceptive acts or practices in commerce. There is even some doubt as to whether the Parker v. Brown state action exemption is applicable to the FTC portion of the antitrust laws. See Badal, *Restrictive State Laws and the Federal Trade Commission*, 29 AD. L. REV. 239 (1977).

195. The Commission has used the Trade Regulation Rules to regulate industries by setting out detailed specifications and standards to be followed in that trade or industry. A violation of a trade regulation rule is not a violation of § 5, but if the Commission proves that a trade regulation has been violated, this is prima facie evidence that § 5 was violated. This practice was approved in *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951, which held that the Commission had the authority to promulgate trade regulation rules which have the effect of substantive law.

cussion in this section is addressed to the problems that would be encountered in trying to apply the standards developed by the FTC for determining whether advertisements are false or misleading to the regulation of legal advertising.

Basically, the FTC has taken a very protective approach toward the consumer, resulting in the development of severe, and often seemingly unrealistic, standards for evaluating the deceptiveness of advertising. Neither actual damage to the public nor actual deception to any consumer need be shown for an advertisement to be declared deceptive by the FTC.¹⁹⁶ The advertisement is examined to see if it has the capacity to deceive.¹⁹⁷ The Act is violated if the advertisement induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract.¹⁹⁸ If an advertisement is capable of being interpreted in a misleading way, it will be construed against the advertiser.¹⁹⁹ If there is an ambiguity of terms used in an advertisement and one meaning is false, the advertisement is false.²⁰⁰ Advertising may be false both for the statements and representations it actually makes and for those that it fails to make.²⁰¹

196. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 79 (1934); *Resort Car Rental Sys. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975); *Spiegel, Inc. v. FTC*, 494 F.2d 59, 62 (7th Cir.), *cert. denied*, 419 U.S. 896 (1974); *Floersheim v. FTC*, 411 F.2d 874, 878 (9th Cir. 1969); *Exposition Press v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *Feil v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960); *Royal Oil Corp. v. FTC*, 262 F.2d 741, 745 (4th Cir. 1959); *Goodman v. FTC*, 244 F.2d 584, 604 (9th Cir. 1957); *Progress Tailoring Co. v. FTC*, 153 F.2d 103, 105 (7th Cir. 1946); *General Motors Corp. v. FTC*, 114 F.2d 33, 35-36 (2d Cir. 1940).

197. The holding in this line of cases, that actual damage or deception need not be shown, is consistent with the finding that an advertisement need only have the capacity to deceive to be labeled deceptive.

198. *FTC v. Colgate-Palmolive*, 380 U.S. 374, 386-87 (1965); *Resort Car Rental v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975); *Exposition Press v. FTC*, 295 F.2d 869, 873 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *Carter Products, Inc. v. FTC*, 186 F.2d 821, 824 (7th Cir. 1951); *Progress Tailoring Co. v. FTC*, 153 F.2d 103, 104 (7th Cir. 1946).

199. *Resort Car Rental v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962); *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952, 954 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960).

200. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 80 (1934); *Waltham Precision Instruments Co. v. FTC*, 327 F.2d 427, 430 (7th Cir. 1964); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962); *Royal Oil Corp. v. FTC*, 262 F.2d 741, 745 (4th Cir. 1959); *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *rev'd on other grounds*, 348 U.S. 940 (1955); *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 280 (3d Cir. 1952).

201. *Spiegel, Inc. v. FTC*, 494 F.2d 59, 63 (7th Cir.), *cert. denied*, 419 U.S. 896 (1974); *Feil v. FTC*, 285 F.2d 879, 884 (9th Cir. 1960); *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952, 954 (2d Cir. 1960); *Royal Oil Corp. v. FTC*, 262 F.2d 741, 744 (4th Cir. 1959); *Aronberg v. FTC*, 132 F.2d 165, 168 (7th Cir. 1942).

Standards such as these, used to evaluate the deceptiveness of advertising, lead to some extreme rulings by the FTC which have been upheld by the federal appellate courts. For example:

(1) The use of "Dollar-a-Day" as a trade name for a car rental agency was found to be misleading, and the FTC issued a cease and desist order forbidding the company to use the trade name.²⁰²

(2) A radio advertisement that a certain deodorant "stopped" perspiration, the first contact between buyer and seller, was held deceptive because the buyer had no means of knowing that the directions printed on the carton and jars called for daily use or use as frequently as needed.²⁰³

(3) Because of the ambiguity of the word "for," an advertisement for medicinal preparations is false if it says the preparation is "for" a disorder that it cannot cure.²⁰⁴

(4) An offer of an apparently unconditional free trial purchase to "new credit customers" was not unconditional because the "new credit customer" had to be approved for credit.²⁰⁵

Such rulings result from the standard used by the FTC for determining whether the advertisement has the capacity to mislead. The standard used in FTC evaluations is not the standard of the reasonable man. The FTC does not ask, "Would a reasonable consumer be misled by this advertisement?" The FTC approach is that section 5 was meant for the protection of the ignorant consumer,²⁰⁶ so the capacity for deception is evaluated by its pos-

202. *Resort Car Rental v. FTC*, 518 F.2d 962 (9th Cir. 1975).

203. *Carter Products, Inc. v. FTC*, 186 F.2d 821 (7th Cir. 1951).

204. *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382 (7th Cir. 1953); *Aronberg v. FTC*, 132 F.2d 165 (7th Cir. 1942).

205. *Spiegel, Inc. v. FTC*, 494 F.2d 59 (7th Cir.), *cert. denied*, 419 U.S. 896 (1974). In his dissent, Judge Pell stated, "If for no other reason, the order of the FTC should be set aside by this court because of the utter triviality of the matter involved." *Id.* at 65. Judge Pell took issue with the finding that Spiegel's advertisement was against public interest, in that

the FTC has in effect found there was detriment to the public interest in the situation of deadbeats being deceived into thinking that they are going to receive a free trial of, or a discount on, merchandise which they could not realistically purchase on either a cash or a deferred basis.

Id.

206. In earlier cases, the courts used more of a reasonable man standard. *See, e.g., Indiana Quartered Oak v. FTC*, 26 F.2d 340, 342 (2d Cir. 1928); *John C. Winston Co. v. FTC*, 3 F.2d 961, 962 (3d Cir. 1925). In 1934, Justice Cardozo stated that the buyer had a right to get what he chooses regardless of whether his choice was made from caprice, from the dictates of fashion, or even through ignorance. *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934). As time passed, the average consumer became less reasonable and more

sible effects on the unlearned and gullible,²⁰⁷ the most ignorant and unsuspecting²⁰⁸ of consumers.

It is obvious that the word "misleading," when used by the FTC, is not used in the plain and ordinary meaning of the word. If the present FTC standards for misleading advertising were applied to legal advertising, the practical result would, in effect, be a return to the absence of legal advertising. If a lawyer wanted to list more than his name, address, and the fact that he was an attorney, it would be impossible to develop an effective advertisement for legal services that would pass such tests for deception. There is a risk that the average, presumably reasonable, consumer does not know enough about legal procedures and his own legal needs to prevent his misunderstanding some parts of a legal advertisement. That risk is increased to certainty when the standard to be applied in evaluating the capacity of a legal advertisement to mislead is that of the ignorant and gullible consumer. This is further complicated by the fact that common justifications for taking the risk in legal advertising of some deception based on a lack of knowledge have been expressly rejected as defenses in FTC actions, namely: (1) The deception that induced the contract can be corrected before the consumer enters into any contractual agreement;²⁰⁹ and (2) the advertisement is needed as a service to the consumer.²¹⁰

To provide realistic regulation of legal advertisements, the FTC would have to develop a different set of standards for application to the legal profession. The FTC law of advertising was developed to deal with the problems of advertising products in a commercial setting in which the sale of that product represents the total identity of the business being conducted. The only contact between the producer and the consumer revolves around that sale. In legal advertising, the purpose of the advertisement is to make an initial contact, and the real interest of both parties is the satisfactory continuation of the ensuing attorney-client rela-

ignorant. *Exposition Press v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *Feil v. FTC*, 285 F.2d 879, 897 (9th Cir. 1960); *Progress Tailoring Co. v. FTC*, 153 F.2d 103, 105 (7th Cir. 1946); *Gulf Oil Corp. v. FTC*, 150 F.2d 106, 109 (5th Cir. 1945); *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942); *General Motors Corp. v. FTC*, 114 F.2d 33, 36 (2d Cir. 1940).

207. *Feil v. FTC*, 285 F.2d 879, 897 (9th Cir. 1960).

208. *Progress Tailoring Co. v. FTC*, 153 F.2d 103, 105 (7th Cir. 1946).

209. See note 81 *supra*.

210. *Spiegel, Inc. v. FTC*, 494 F.2d 59, 64 (7th Cir.), *cert. denied*, 419 U.S. 896 (1974).

tionship. The consumer has a greater opportunity to evaluate whether he is satisfied with the service he is receiving for his money. Getting divorced, setting up trusts, making wills, and filing lawsuits cannot be equated with impulse buying in response to deceptive marketing practices.

Considering the problems involved in applying FTC standards to legal advertising, the FTC may choose to avoid the problem altogether. The goals of the organized bar and the goals of the FTC are the same: the dissemination of information to the public without deception. If the organized bar can provide an effective means of reaching this common goal, the FTC may prefer to leave regulation of lawyer advertising to the profession. The FTC has the authority to step in at any time to correct a deceptive practice,²¹¹ so it has the option of waiting to see if the profession provides effective regulations before attempting to assume control of legal advertising. Given the approach to advertising already taken by the FTC, an effort to conform to the protective attitude of the FTC toward the consumer would indicate that the bar should attempt to exercise very tight control over individual attorneys in the reformulation of Canon 2.

C. Conclusion

The organized bar has been increasingly subjected to forces of outside regulation in recent years. The revision of Canon 2 represents a critical point in the efforts of the bar to maintain self-regulation. The approach that is taken in the revision will determine the content of the rules that ultimately will be applied to practicing lawyers. The application of those rules will also ultimately determine to what extent the profession will be allowed to continue regulating itself. The problem is that the forces of outside regulation are not all pushing in the same direction. In the reformulation of Canon 2, there is one controlling question: should the bar take the nonrestrictive approach indicated by first amendment considerations and the antitrust laws or the more restrictive approach indicated by the influence of the FTC as a possible force of regulation for the profession?

211. The lumber industry in general had been trading a botanically yellow pine (*pinus ponderosa*) under the designation name of California White Pine for over 30 years when the FTC declared the practice deceptive. Writing for the Court, Justice Cardozo stated "There is no bar through lapse of time to a proceeding in the public interest to set an industry in order by removing the occasion for deception or mistake. . . ." *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 80 (1934).

IV. IMPACT OF CANON 2: SOME PROBLEM AREAS

The concerns of this section are twofold. The first is to provide a comparative analysis and evaluation of the ABA's newly adopted post-*Bates* Canon 2 (called Proposal "A" in draft form) with its variant (Proposal "B"), which was also considered by the Task Force on Lawyer Advertising and was ultimately rejected.²¹² The second is to survey, with some emphasis on potential problem areas, the various state bar association attempts to provide guidelines on lawyer advertising in the wake of the *Bates* decision. A comparison of some representative sections of the two proposed versions of Canon 2 will be dealt with first.

The newly adopted Canon 2, Proposal "A," is characterized by the Task Force in its Report to the Board of Governors as regulatory; Proposal "B" is labeled directive. The approach of Proposal "B" represents a radical departure from the pre-*Bates* Canon 2, while Proposal "A" retains many more of the restrictions of the pre-existing canon.²¹³

Each proposal reaches essentially the same conclusion with regard to two issues likely to be of interest to the profession: the use of electronic media in advertising, and the continued maintenance of the ban on in-person and direct-mail solicitation of clients. While authorizing prerecorded radio advertisements, each proposal would presently disallow the use of television.²¹⁴ Both proposals would leave open to the states the possibility that television advertising be allowed in the future if needed to provide the public with adequate information regarding legal services. According to the Report to the Board of Governors by the Task Force on Lawyer Advertising, television advertising may be allowed in the future only if proper safeguards can be developed to protect the consumer's interest.²¹⁵ One of the potential areas for abuse pointed out by the Task Force is the concern that the television format might emphasize style over substance. A different position was taken by the Department of Justice, however, in its urging that all electronic media advertis-

212. The Task Force on Lawyer Advertising was established by the ABA's Board of Governors, June 7, 1977, in response to *Bates* to consider possible proposals to the ABA's Model Code of Professional Responsibility. Proposals "A" and "B" are reproduced in Appendix D. See 46 U.S.L.W. 1 (Aug. 23, 1977).

213. 46 U.S.L.W. at 2.

214. See Proposal "A" EC 2-2 and Proposal "B" DR 2-101 (C-7) in Appendix D.

215. 46 U.S.L.W. at 2.

ing be allowed now.²¹⁶ Despite the Department of Justice position and a recommendation from the ABA Standing Committee on Ethics and Professional Responsibility that all electronic media advertising be allowed, the chairman of the Task Force on Lawyer Advertising said the Task Force could not support those recommendations because the Task Force had neither the time nor the expertise to "identify or fully evaluate all the problems involved or to develop appropriate proposed regulation on lawyer advertising."²¹⁷ While not completely answering the Justice Department's objections, the ABA's receptiveness to possible future television advertising is an explicit recognition of the special informational needs of the estimated twenty percent of the adult population that is functionally illiterate²¹⁸ and thus unreachable through the conventional print media. Since some lawyers have already ventured into the area of television advertising,²¹⁹ it seems unlikely that the states will be able to defer judgment on this issue for very long.

The traditional ban against in-person solicitation of clients is continued in both proposals.²²⁰ However, the dissimilarities in

216. "It is difficult to perceive," maintained the Department of Justice, "why the identical information contained in a printed advertisement becomes improper when it is presented over the air." The Justice Department further objected to the fact that television advertising would be disallowed until proven necessary:

Such a shift in the burden of proof seems clearly inappropriate in the absence of a strong showing that electronic media advertising is inherently harmful. Such a showing has not been made, and may well be impossible to make. Until such time, we believe that the use of electronic media should be permitted subject to the same types of regulations as are applicable to other forms of advertising.

Letter from John H. Shenfield, Acting Asst. Att'y Gen. of the Antitrust Div. of Dep't of Justice, to F. LaMar Forshee, Director, Center for Professional Discipline, ABA, (Aug. 3, 1977), at 3.

The South Carolina Bar Report of the Subcommittee on Professional Standards to the Professional Responsibility Committee recommended that both television and radio advertisements be allowed. Basically the same information could be conveyed on radio and television as in the print media. However, the communication of fee information would be further restricted to the advertisement of three particulars: (1) Whether credit card or other credit arrangements are accepted; (2) fee for an initial consultation; (3) the availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services. See DR 2-101(B)II of recommended Canon 2 appended to South Carolina Bar Report.

217. Statement of S. Shepherd Tate, before the House of Delegates of ABA, Chicago, Ill. (Aug. 10, 1977). Transcript at 3-4.

218. 46 U.S.L.W. at 2.

219. See *Wall St. J.*, Sept. 9, 1977, at 1, col. 1.

220. DR 2-103 in Proposals "A" and "B," Appendix D. The issue of in-person solicitation will soon be before the United States Supreme Court in an appeal from the South

the range of proscribed lawyer conduct in each merits consideration. Each starts from the same basic position: the lawyer shall not "recommend employment as a private practitioner, of himself, his partner, or associate to a layperson [non-lawyer in "B"] who has not sought his advice regarding employment of a lawyer."²²¹ The ethical considerations of each proposal acknowledge, however, that under certain circumstances in volunteering information to laypersons, lawyers may be helping to fulfill their professional duty in assisting laypersons to recognize the legal character of their problems.²²² The proposals differ significantly in advising lawyers of proper conduct once they have helped non-lawyers identify problems as being legal in nature.²²³ Proposal "B" recognizes a distinction between intent and result in the situations in which lawyers give advice, not motivated by a desire to obtain employment, which subsequently result in their being asked to represent individuals whom they had advised regarding the legal nature of their problems.²²⁴

In the former situation, the lawyer would intend, in giving unsolicited advice to the layperson, that he be ultimately employed by the person to whom he gave the legal advice. In the latter situation, the giving of advice would be motivated by altruistic, service-oriented reasons and not by a desire to be subsequently employed by the layperson to whom he spoke. The ensuing employment relationship would result only incidentally and at the behest of the layperson. Proposal "B," while stating that

Carolina Supreme Court. *In re Smith*, 268 S.C. 259, 233 S.E.2d 301, *cert. granted*, 46 U.S.L.W. 3179 (Oct. 4, 1977) (No. 77-56) with *Ohralik v. Ohio State Bar Ass'n*, 48 Ohio St.2d 217, 357 N.E.2d 1097 (1976), 46 U.S.L.W. 3179 (Oct. 4, 1977) (No. 76-1650). The state supreme court held that Ms. Smith

has therefore, violated DR 2-103(D)(5)(a) by attempting to solicit a client. . . .

If respondent's contention that her actions were protected by the First and Fourteenth Amendments of the Constitution were upheld, it would amount to a holding that the pertinent provision of Canon 2 of the Code of Professional Responsibility was unconstitutional, which we are not prepared to do.

233 S.E.2d at 306.

221. DR 2-103(A) of Proposals "A" and "B" in Appendix D.

222. EC 2-3 of Proposals "A" and "B" in Appendix D.

223. Each proposal specifically disallows a lawyer from contacting a non-client for the purpose of being retained to represent him for compensation. See EC 2-3 of Proposals "A" and "B" in Appendix D.

224. EC 2-4 of Proposal "B" in Appendix D. Whether a distinction between such subjective matters as motive and result could ever be adequately proved to an independent observer is open to question. This problem is acknowledged in EC 2-4 of Proposal "A" but is omitted from Proposal "B."

subsequent employment as counsel of a lawyer who has volunteered in-person advice "gives at least the appearance of impropriety,"²²⁵ does not flatly prohibit the resulting employment relationship. It would only be prohibited where the advice given was based on claims that were "false, fraudulent, misleading or deceptive"²²⁶ or involved the use of "coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct."²²⁷

In contrast to Proposal "B," Proposal "A" explicitly prohibits the formation of an employment relationship that has arisen from the attorney's giving unsolicited legal advice,²²⁸ except in a very limited range of circumstances: where the layperson is a close friend, relative, former client in a related matter, or present client,²²⁹ or under the auspices of a qualified legal assistance program.²³⁰ While Proposal "B" gives the lawyer certain ethical guidelines to consider in reaching decisions, Proposal "A" makes the lawyer participating in the ensuing relationship automatically subject to discipline.

The differing treatment accorded the solicitation issue in the two proposals is quite characteristic of the different approach of each proposal to the Ethical Considerations and Disciplinary Rules throughout the canon. Where Proposal "B" guides the lawyer, Proposal "A" mandates. Ethical Consideration 2-8 exemplifies this. Both variants contain the identical catalog of information which may be included in an advertisement; however, they are prefaced quite differently. Proposal "A" states flatly, "Such information includes," whereas Proposal "B" uses the more suggestive form, "Information that may be helpful in some situations would include" The implication that the list in "B" is not meant to be exhaustive is supported by an analysis of the sections following the listing of appropriate information. Proposal "A" EC 2-8 ends with the simple statement, "[S]elf-

225. *Id.*

226. DR 2-104(A)(1) of Proposal "B" in Appendix D.

227. DR 2-104(A)(2) of Proposal "B" in Appendix D.

228. DR 2-104(A) of Proposal "A" in Appendix D.

229. DR 2-104(A)(1) of Proposal "A" in Appendix D.

230. DR 2-104(A)(2) of Proposal "A" in Appendix D. In DR 2-103(D) of Proposal "A," qualified legal assistance organizations are broken down into (1) legal aid or public defender offices; (2) military legal assistance office; (3) a lawyer referral service operated, sponsored, or approved by a bar association; (4) any bona fide organization that recommends, furnishes, or pays for legal service to its members or beneficiaries subject to the fulfillment of certain numerous conditions specified in subcategories a-g.

laudation should be avoided." Proposal "B" adds two new sections, EC 2-8A and EC 2-8B, which help elucidate the goals and purposes of lawyer advertising and stress the need for avoiding deception. This elaboration of the ethical issues involved would not be necessary if the content of advertisements had been strictly circumscribed, as in Proposal "A."

Aware that Proposal "A" more rigidly structures lawyer behavior, the drafters include a significant provision in EC 2-10. This section, not paralleled in Proposal "B," acknowledges that since society's conception of what is relevant is not static, a mechanism should be provided for the consideration of proposed changes to the rule. Perhaps this is some indication that the ABA considers the adoption of Proposal "A" to be a desirable interim measure, though not necessarily the profession's final stance on the right of lawyers to advertise.²³¹

While there is, not surprisingly, much overlap in the Ethical Considerations supporting both versions of the canon, there is a marked dissimilarity between the two proposals in their respective Disciplinary Rules. In the Ethical Considerations the two draft proposals often start with the same ethical substructure but build on to it in different ways.

The handling of EC 2-8, which concerns the informed selection of a lawyer, is illustrative of the point. In pertinent part, EC 2-8 of Proposal "A" reads, "[D]isclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed." In contrast, Proposal "B" reads, "[R]estrained publicity may be helpful." The sentence starting with "A layperson is best served," has been stricken from Proposal "B." After this

231. Many states have yet to revise their codes to make them consistent with *Bates*. Although the majority of the states that have made recommendations, or have already adopted, a new Canon 2, have accepted what is basically Proposal "A," several states have done otherwise. Idaho's state bar proposal is essentially Proposal "B." The recommendation of the Board of Governors of the District of Columbia Bar Association is unique. Awaiting adoption by the Court of Appeals for the District of Columbia is a proposal that goes significantly beyond even the provisions of ABA Proposal "B." It would not only eliminate the general proscription against advertising, but also remove the bar against solicitation under most circumstances. One of the guiding hands in drawing up this proposal was Dean Monroe Freedman, former chairperson of the Legal Ethics Committee of the D.C. Bar. The District of Columbia and the state of Idaho should prove to be significant testing grounds for the theories on the present viability or practicality of Proposal "B" in terms of a perceived danger to the public from less readily regulated lawyer advertising.

divergence, each proposal continues with the same caveat that "a lawyer should not seek to influence another to recommend his employment." Each Ethical Consideration starts with the premise that selection of a lawyer should be made on an informed basis. The proposals differ, however, in the means to this end.

The drafters' handling of certain Disciplinary Rules is no different. For example, each version of DR 2-101 starts with essentially the same statement: "A lawyer shall not . . . use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, or deceptive [self-laudatory or unfair in Proposal "A"] statement or claim." After this the proposals diverge radically. Proposal "A" limits the geographic range of the advertisements to areas in which "the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides." It then sets forth twenty-five categories of information that describe the sum of the information that can be revealed in advertisements. These twenty-five categories, while covering a greater scope of information than as a practical matter could appear in a single ad, by no means exhaust all the items of information which might prove helpful to the client in search of a lawyer.²³² The major provision of Proposal "B" DR 2-101 is the aforementioned directive against false, fraudulent, misleading, or deceptive statements coupled with an elaborate set of guidelines to assist the attorney in deciding for himself what statements may properly be included in advertisements. This set of guidelines replaces the exclusive twenty-five categories of Proposal "A."

An argument frequently proffered for the continuation of a restrictive approach to attorney advertising has centered on an interpretation of the nature of attorneys as professionals.²³³ No-

232. Information that could prove relevant to a potential consumer of legal services might include such data as a breakdown on how the lawyer's time was apportioned among various areas of the law and categories or types rather than just names of clients represented. This data goes beyond what the drafters of Proposal "A" would allow. It is suggested that information presented in this manner might be considerably more helpful to a potential consumer of legal services than a bare list of client names. The utility of a listing of fields of law practiced could be enhanced by allowing an indication of a proportional division of time spent in various areas. Further categories are proposed by the plaintiffs in *Consumers Union of United States v. American Bar Ass'n*, 427 F. Supp. 506, 522 (E.D. Va. 1976), *vacated and remanded*, 97 S. Ct. 2993 (1977) (in light of *Bates*).

233. See, e.g., the arguments raised by the appellees in *Bates*, 97 S. Ct. at 2701. The proposition that advertising should be disallowed on the ground that competitive communications would have a detrimental effect on the professional nature of attorneys was

tions of what constitutes "professional" behavior subsume two partially separable concepts. The first involves a sense of dignity in the image projected and a concomitant distancing from the pressures of the marketplace. The second involves the concept of dedication to the public interest.²³⁴ In the advertising situation the two notions may at times appear to be in conflict. It is primarily the first concept of professional which is meant by the *Bates* court when it uses the following language:

Bankers and engineers advertise, and yet these professions are not regarded as undignified. In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community Indeed, cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients.

. . . Since the belief that lawyers are somehow "above" trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.²³⁵

This strong concern with laypersons' unmet informational needs, coupled with the lingering notion that professionals, in the second sense in which this term has been used, are somehow different, gives rise to the suggestion that rejected Proposal "B" might better answer these two concerns, though not without raising others. Although a full exploration of the concept of a regulatory code as applied to a profession goes beyond the scope of this project, several comments are called for here. From an ideal perspective, the concept of a profession, as distinct from any other form of labor, should imply a degree of self-restraint, a capacity for making considered ethical judgments, and a certain commitment to the public good. A faith in the supposition that those who practice law take these values seriously should go far

considered and rejected in Comment, *Bar Restrictions on Dissemination of Information About Legal Services*, 22 U.C.L.A. L. REV. 483, 509, 512 (1974), and in Comment, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1154, 1189-90 (1972).

234. The type of public interest meant here is the interest of the public in receiving a free and unfettered flow of information, not the other important interest of the public in being protected from information that is false or deceptive.

235. 97 S. Ct. at 2701-03.

toward relieving the worries expressed by some that lawyers, if given the opportunity to say anything about themselves, would indulge in large-scale overreaching, misrepresentation, or other forms of unethical behavior. It is in fact, as the *Bates* Court points out, somewhat anomalous "for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort."²³⁶ If lawyers as professionals can be assumed to aspire to a high ethical standard, then why should it be necessary to as narrowly circumscribe what lawyers may be allowed to say about themselves as Proposal "A" has done? Would not the open structure of Proposal "B," with its emphasis on providing ethical guidelines to help attorneys in their own search for moral demarcations, be more appropriate? The issue is one of how much moral discretion can be entrusted to the professional consistent with safeguarding the layperson against unethical behavior. On an ideal level, the professional's moral judgment would not conflict with the public interest. In reality, however, it would be naive to assume that the layperson would automatically be protected if the professional were given complete discretion in what he may say about himself.

The failure of Canon 2 to live up to its title has been the subject of extensive commentary.²³⁷ The issue is raised again only to provide a historical background which may prove helpful in attempting to evaluate and put into perspective the current proposed redrafts of Canon 2. The central question involves a deter-

236. *Id.* at 2707.

237. For an early discussion of the Canon's shortcomings, see Kaufman, *The Lawyer's New Code*, 22 HARV. L. SCH. BULL. 19 (1970), which contains the following statements:

The layman might be pardoned for thinking that the profession's rules against advertising and soliciting violate the Canon they purport to enforce, since they have a tendency to restrict the availability to the public of information about lawyers. . . .

. . . Traditionally, the legal profession and its disciplinary committees have concerned themselves as much or more with this kind of prohibition than with the rules relating to dishonesty.

Id. at 20. See also Freedman, *Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility*, 4 HOFSTRA L. REV. 183 (1976). Freedman, building on Kaufman's distinction between two types of rules, those which relate to the integrity of the system of justice, and those which are more guild-like and anti-competitive in character, says that the guild-like provisions were allowed to predominate over and pervert the more fundamental truly ethical considerations of the Canon. For a further critical evaluation of the efficacy of the pre-*Bates* Code, see Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

mination of which proposal better meets both the informational and protective needs of the consumer of legal services.

The Department of Justice was unable to support either Proposal "A" or Proposal "B" although it acknowledged that Proposal "B" was preferable.²³⁸ Counsel for the ABA in this matter advised that Proposal "A" was legally defensible but that "Proposal 'B' is more easily defended."²³⁹

Proposal "A" appears to be easier to enforce and, in the view of the ABA, offers a greater measure of protection to the consumer. Proposal "A" would require enforcing a list of twenty-five exclusive categories; Proposal "B," however, would require regulating bodies to deal with less definite and less easily characterized notions of what is false, fraudulent, misleading, or deceptive. Unquestionably, the consumer has the potential for receiving a greater range of relevant information; but also, so the argument for withholding goes, runs the greater risk of being misled by a barrage of "slippery" quasi-truths and self-aggrandizing claims. As the Supreme Court sees the first amendment issue in *Bates*, the choice is between "the dangers of suppressing information and the dangers arising from its free flow."²⁴⁰ In this context, perhaps the approach of Proposal "B" of leaving advertisement

238. The concept underlying Proposal "B" is clearly preferable to that of Proposal "A"; any prohibitions on the dissemination of commercial information should be limited to those necessary to prevent public harm, and should be no more restrictive than is essential to accomplish that objective. Unfortunately, neither proposal is completely consistent with this concept. Letter from John H. Shenfield, Acting Asst. Att'y Gen. of the Antitrust Div. of Dep't of Justice, to F. LaMar Forshee, Director, Center for Professional Discipline, ABA, (Aug. 3, 1977), at 3.

239. Statement of S. Shepherd Tate, before the House of Delegates of ABA, Chicago, Ill. (Aug. 10, 1977). Transcript at 5.

240. 97 S. Ct. at 2699, where the Court further develops the relative interests involved:

The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of importance to significant issues of the day. . . . And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and this performs an indispensable role in the allocation of resources as in a free enterprise system. . . . In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.

Id. It is also interesting to note the dissenting opinion of the judge in the court below. As cited in the Supreme Court opinion, "the case should have been framed in terms of 'the right of the public as consumers and citizens to know about the activities of the legal profession . . . rather than as one involving merely the regulation of a profession.'" *Id.* at 2696.

content to the discretion of the individual attorney, with the limitation that it is not false, overreaching, or fraudulent, is more consistent with the concomitant first amendment rights of speech and hearing but less protective of the consumer.²⁴¹ The ABA Task Force and general membership, however, felt that the proposal that, in their opinion, provided the greatest protection for the public and guidance to the lawyer was preferable at this time.²⁴² It is significant to note, however, that the major consumer groups supported Proposal "B" over Proposal "A."²⁴³

Greater enforceability and clarity of guidelines are the primary practical advantages of Proposal "A." The *Bates* Court has entrusted to the bar association the responsibility for formulating a means of effectively regulating lawyer advertising. The definite and specific guidelines of the new Canon 2 may be more helpful to the individual practitioner who is venturing for the first time into this uncharted area than would be the less clearly delineated consideration of Proposal "B."

A further issue in considering lawyers as professionals involves the distinctions between individual and institutional advertising. The informational needs of the consumer of legal services are twofold: first, assistance in recognition of legal problems and, second, assistance in obtaining the lawyer most suitable for resolving the particular legal problem. Both proposals encourage the lawyer to participate in educational and public relations pro-

241. Of possible predictive value for the future of Canon 2 on the first amendment issue is a recent Virginia case, *Consumers Union of United States v. American Bar Ass'n*, 427 F. Supp. 506 (E.D. Va. 1976), *vacated and remanded*, 97 S. Ct. 2993 (1977), in which a divided three judge federal court held that the right of the consumer to be given information about attorneys (more information than would be provided by Proposal "A") was a constitutionally protected right. It might be helpful to bear in mind that what is suggested is not to give lawyers a greater latitude in what information they can convey to the public than is enjoyed by others. It is, rather, to bring the professional to a position of first amendment parity with others who advertise.

242. Statement of S. Shepherd Tate, before the House of Delegates of ABA, Chicago, Ill. (Aug. 10, 1977). Transcript at 4.

243. Proposal "A" was adopted notwithstanding persuasively argued challenges to its first amendment constitutionality by such groups as the American Civil Liberties Union and the Consumers Union. The thrust of the Consumers Union argument is that the disciplinary rules are vague and overbroad to the detriment of first amendment rights. Representative of this thrust is Consumers Union's attack on the 25 categories of allowable information. Consumers Union argues that this "'laundry list' approach has an excellent chance of being found to be overbroad." Sutton, *Critique of ABA Task Force Proposals "A" and "B"*, (filed Aug. 2, 1977) in ABA DISCIPLINARY LAW AND PROCEDURE BRIEF BANK, #3 Microfiche 02126 at 02136. See section II notes 101-02 & accompanying text *supra*.

grams on legal problems and the legal system²⁴⁴ if motivated by altruistic principles rather than by self-interest.²⁴⁵ By specifying the exclusive categories of information in Canon 2, the drafters have made a choice to preclude advertisements filling both informational needs at once.²⁴⁶ The probable consequence of this choice is that individual attorneys or firms will be confined to attracting potential clients in their direction, while the more public service oriented, problem-recognition function is likely to be left to the profession as a whole.²⁴⁷

The Board of Governors of the ABA addressed the issue of institutional or educational advertising and recommended that a special committee be created to study the feasibility of funding and scope of a "nationwide institutional advertising program to educate consumers to the utility, cost and availability of legal services."²⁴⁸ Given the restrictions on what lawyers may say about themselves in advertisements, and the widespread, though not universal, inaction of the profession in meeting consumers' educational needs, it is likely that the consumers' need for information about particular lawyers will be met far sooner than will their need for assistance in the recognition of legal problems. To be fully deserving of professional status, the legal profession must strive to meet both kinds of informational needs, not just the more business oriented ones. If the various state bar associations and the national ABA do jointly or independently institute a vigorous consumer education program, then perhaps the perceived danger to consumers would be sufficiently lessened so that a less restrictive stance on advertising could be adopted.

On a practical level, it is apparent that several issues have been raised but not resolved by the interplay between the *Bates*

244. EC 2-2 in Appendix D.

245. It has been said, "Possibly there are lawyers who participate in public programs on legal subjects out of an unalloyed desire to benefit the public and not themselves, but whooping cranes are more numerous." Smith, *Canon 2: A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available*, 48 TEX. L. REV. 285, 288 (1970).

246. See Wilson, *Madison Avenue, Meet the Bar*, 61 A.B.A.J. 586 (1975) for examples of mock-up advertisements that attempt to both pinpoint a legal need and suggest a particular law firm to fill it.

247. It is not suggested that an individual law firm, given the choice, would want to use its advertising budget to steer potential clients to another law firm, but rather that it might wish to sponsor advertisements which would be more generally educational in nature.

248. 46 U.S.L.W. at 1.

decision and the new Canon 2. Among these concerns are the need for a definition of a "routine legal service" and a consideration of the area of lawyer specialization and certification.

Each proposal for Canon 2 would allow the attorney or firm to indicate either a limitation of practice to certain fields of law, or an indication of specialization in those areas in which specialization has been historically permitted, *i.e.*, admiralty, trademark and patent law, or an indication of certification where such is authorized and defined by the particular jurisdiction.²⁴⁹ One practical problem in this regard is that states may find themselves pushed into formulating guidelines for specialists where none had existed previously. For example, a problem facing the Executive Council of the Arkansas Bar Association is that Arkansas has no agency having jurisdiction of the subject under state law that will or has set forth designations and definitions. The executive counsel believes that "for an attorney to use the term 'specialist' or 'certified specialist' where there is no such agency which determines certification would be misleading and therefore prohibited."²⁵⁰ According to the council, a more difficult problem concerns whether the attorney who does not claim to be a specialist, but who limits his practice to one or more fields of law in a state in which no agency has jurisdiction over designations and definitions, will be allowed to advertise his limitation of practice.

Another problem in this area is the interplay between self-proclaimed specializations and state designated certifications. If provisions are made for formal certification programs involving a possible combination of continuing legal education programs, vigorous subject matter examinations, and a minimum number of years of practice in the field, it remains to be seen whether self-proclamations would be allowed to coexist with the higher standards for formal certification. The issue here is whether certification would, in effect, become mandatory, *i.e.*, whether only those certified in a particular field of law would be allowed to practice in that area.²⁵¹ Even if certification did not become a prerequisite for practicing in a particular field of law, an attitudinal change toward general practice lawyers might result. Such lawyers or

249. EC 2-14 and DR 2-105 in Appendix D.

250. Report and Recommendations of the Specialization and Advertising Committee of the Arkansas Bar Association, Aug. 1977 at 4.

251. According to the ABA Specialization Bulletin issued Sept. 1, 1977, this concern was expressed by the Young Lawyers Section.

small firms might be perceived as analogous to the general practitioner physicians and is somehow less prestigious or less qualified than the newer specialists.

Another problem which may manifest itself on the state level involves the interrelationship between lawyer specializations and the determination of what constitutes a routine legal service. The *Bates* decision lists four items as examples of routine legal services: uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name. The state responses fall into four categories ranging from Louisiana's interim regulation that stays narrowly within the limits of *Bates*²⁵² to New York, which states that "trying to permit advertising of nothing whatever beyond the particular fee information on 'routine legal services' which was held entitled to protection on behalf of Messrs. Bates and O'Steen . . . would be a disservice to the Bar and a waste of time in presenting to the Appellate Divisions."²⁵³ New York's draft for DR 2-101 (25) may prove particularly farsighted and durable in defining what fee information may be published to include the following:

Fixed fees for specific legal services, fairly described in the statement, provided the legal services are clearly defined in a writing furnished by the attorney at the time of actual engagement. Such legal services shall include all those services which are recognized as reasonable and necessary for the transaction involved under local custom in the area of practice in the community where the services are performed.²⁵⁴

An intermediate approach is taken by the New Hampshire Supreme Court in establishing temporary guidelines for lawyer advertising. New Hampshire would permit the price advertisement of fourteen particular services that it defines as routine.²⁵⁵

252. Letter from Louisiana State Bar Association Task Force on Lawyer Advertising, to members of the Louisiana State Bar Association, Sept. 2, 1977. Alabama, New Jersey, and North Carolina also follow this approach.

253. Letter from Action Unit No. 3, New York State Bar Association, to Committee and Section Chairpersons, Sept. 7, 1977, at 1.

254. New York State Bar Association Draft of Canon 2, Aug. 30, 1977, at 9. Indiana, Vermont, Tennessee, and Michigan follow the substantially similar approach of providing no list of routine services but setting out guidelines for the determination of what is routine.

255. *Order by the New Hampshire Supreme Court Establishing Temporary Guidelines for Advertising by Members of the New Hampshire Bar*, 4 New Hampshire Law Week 14A (Supp. July 20, 1977).

Another alternative approach to solving the problem of what is routine is an FDA type identity-standards approach. If the service offered did not contain certain elements, it could not be called, for example, a divorce. This approach would not require that all the elements of the service be listed in the advertisement, which would be an unduly cumbersome requirement and would probably have a deterrent effect on any price advertising. It would require, instead, that all lawyers be made aware of the technical requirement for advertising a particular service and would subject them to sanctions for failing to deliver services that complied with the guidelines.

In a state that adopts restrictive guidelines for determining what constitutes a routine legal service, but allows a wide range of specialization listings, one can imagine a situation in which some lawyers would be allowed to advertise the prices of their services that are deemed routine while other specialists would be denied the privilege since their service would not be deemed routine by the state authorizing body. This could happen in a circumstance in which the particular lawyer's services are routine for someone in his area of specialization but could not be characterized as routine for the profession as a whole. Perhaps the expertise and specialized knowledge of the various sections and divisions of the state bar associations could be utilized by the state agencies in formulating guidelines for what is routine in each particular area of practice.

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Colorado, Mississippi, and Maryland also follow this approach in listing specific services which are considered to be routine. Maryland takes a unique approach in listing categories of services deemed routine coupled with the requirement that the advertisement itself specify whether certain "component parts" are included. Illustrative is Maryland's DR 2-103(A)10(d): "If constituting an offer of services in connection with non-business uncontested bankruptcy, [such advertisement must] contain a statement as to whether higher fees obtain in cases involving substantial assets, whether the fee includes review and any necessary contest of claims of creditors, and whether the fee includes any necessary court appearance, and as to any filing fees." Second Draft, Maryland Disciplinary Rules (unpublished, July 1, 1977).

APPENDIX A

Table 1

NATIONAL NUMERICAL AND PERCENTAGE TABULATIONS OF DISCIPLINE
IMPOSED FOR 1973, 1974, AND 1975 AT STATE LEVEL

I. Numerical Tabulation:		Resignations With Disciplinary				Public Reprimand	Private Reprimand	Totals
Year	Disbarments	Charges Pending	Suspensions					
A. 1973	73	31	144		64	333		645
B. 1974	114	80	256		104	356		910
C. 1975	129	133	289		142	505		1198
		*	*	*	*	*		
II. Percentage Increase Tabulation:						Public Reprimand	Private Reprimand	Totals
A. 1973 to 1974	56%	158%	77%		62%	6%		41%
B. 1974 to 1975	13%	66%	12%		36%	41%		31%
C. 1973 to 1975	76%	329%	100%		121%	51%		85%

APPENDIX B

Table 2

**NATIONAL KEY STATE LEVEL DISCIPLINARY
ENFORCEMENT STATISTICS AND COMPARISONS FOR 1975**

I. Statistics:

A. Population of the United States:	214,304,000
B. Lawyer Population of the United States:	404,772
C. Total Dollar Amount Spent for Disciplinary Enforcement:	\$8,125,680
D. Number of Complaints Made Against Lawyers to State Level Disciplinary Agencies:	33,007
E. Number of Full-Time Employees Involved in Disciplinary Enforcement:	
1. Lawyers:	133
2. Investigators:	40
3. Clerical Personnel:	155
F. Total Instances of Public Discipline Imposed (129 Dis- barments, 133 Resignations with Disciplinary Charges Pending, 289 Suspensions and 142 Public Reprimands):	693

II. Comparisons:

A. Lawyer Population Averaged over Complaints Made (Item I. B./ Item I. D.):	1 Complaint per 12.26 Lawyers
B. Lawyer Population Averaged over Instances of Public Discipline Imposed (Item I. B./Item I. F.):	1 Instance of Public Discipline Imposed per 584 Lawyers
C. Dollar Amount Spent Averaged on a Per Lawyer Basis (Item I. C./ Item I. B.):	\$20.07 per Lawyer
D. Complaints Made Averaged over the Instances of Public Disci- pline Imposed (Item I. D./ Item I. F.):	47.6 Complaints per Instance of Public Discipline Imposed

APPENDIX C

Table 3

1975 NATIONAL TABULATION OF THE ADOPTION AT THE STATE
LEVEL OF 14 SIGNIFICANT RECOMMENDATIONS OF THE
"CLARK REPORT"

Recommendation	Percentage of State Level Disciplinary Jurisdictions Adopting Rules Similar To That Suggested in Recommendation
A. Centralization of Disciplinary Enforcement:	87%
B. Rotation of Membership of Disciplinary Boards:	87%
C. Initiation of Investigation without Complaint:	92%
D. Centrally Located Records of Complaints:	81%
E. Informal Admonition of Minor Misconduct:	79%
F. Resignation with Prejudice While Under Disciplinary Investigation:	72%
G. Suspension for Incapacity:	83%
H. Reciprocal Discipline:	66%
I. Suspension on Conviction of Serious Crime:	79%
J. Conviction Conclusive Evidence of Guilt for Disciplinary Proceeding:	87%
K. Protection of Clients When Attorney Disciplined, Dies or Disappears:	51%
L. No Rapid Reinstatement After Disbarment:	83%
M. Required Accounting for Client Funds:	55%
N. Audit of Attorneys' Trust Accounts:	14%

APPENDIX D

PROPOSAL "A"

CANON 2

A LAWYER SHOULD ASSIST
THE LEGAL PROFESSION IN
FULFILLING ITS DUTY TO MAKE
LEGAL COUNSEL AVAILABLE

EC 2-1 * * *

RECOGNITION OF LEGAL
PROBLEMS

EC 2-2 The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers. The problems of advertising on television require special consideration, due to the style, cost, and transitory nature of such media. If the interests of laypersons in receiving relevant lawyer advertising are not adequately served by print media and radio advertising, and if adequate safeguards to protect the public can reasonably be formulated, television advertising may serve a public interest.

EC 2-3 Whether a lawyer acts properly in volunteering in-person advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is

proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an in-person contract with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.

EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers in-person advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

EC 2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laypersons should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

SELECTION OF A LAWYER

EC 2-6 * * *

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers. Lack of information about the availability of lawyers, the qualifications of particular lawyers, and the expense of legal representation leads laypersons to avoid seeking legal advice.

EC 2-8 Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties — relatives, friends, acquaintances, business associates, or other lawyers — and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment.

A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisements and public communications, whether in law lists, telephone directories, newspapers, other forms of print media or radio, should be formulated to convey only information that is necessary to make an appropriate selection. Such information includes: (1) office information, such as, name, including

name of law firm and names of professional associates; addresses; telephone numbers; credit card acceptability; fluency in foreign languages; and office hours; (2) relevant biographical information; (3) description of the practice, but only by using designations and definitions authorized by [the agency having jurisdiction of the subject under state law], for example, one or more fields of law in which the lawyer or law firm practices; a statement that practice is limited to one or more fields of law; and/or a statement that the lawyer or law firm specializes in a particular field of law practice, but only by using designations, definitions and standards authorized by [the agency having jurisdiction of the subject state law]; and (4) permitted fee information. Self-laudation should be avoided.

SELECTION OF A LAWYER:

LAWYER ADVERTISING

EC 2-9 The lack of sophistication on the part of many members of the public concerning legal services, the importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising, require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in law advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service, which cannot be measured or verified.

Since lawyer advertising is calculated and not spontaneous, reasonable regulation of lawyer advertising de-

signed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public.

EC 2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcasted is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to compare the qualifications of the lawyers available to represent him. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Because technological change is a recurrent feature of communications forms, and because perceptions of what is relevant in lawyer selection may change, lawyer advertising regulations should not be cast in rigid, unchangeable terms. Machinery is therefore available to advertisers and consumers for prompt consideration of proposals to change the rules governing lawyer advertising. The determination of any request for such change should depend upon whether the proposal is necessary in light of existing Code provisions, whether the proposal accords with standards of accuracy, reliability and truthfulness, and whether the proposal would facilitate informed selection of lawyers by potential consumers of legal services.

Representatives of lawyers and consumers should be heard in addition to the applicant concerning any proposed change. Any change which is approved should be promulgated in the form of an amendment to the Code so that all lawyers practicing in the jurisdiction may avail themselves of its provisions.

EC 2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The

use of a trade name or an assumed name could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under a designation containing his own name, the name of a lawyer employing him, the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, the name of a professional legal corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12 * * *

EC 2-13 * * *

EC 2-14 In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate in permitted advertising, if it is factual, a limitation of his practice or one or more particular areas or fields of law in which he practices using designations and definitions authorized for that purpose by [the state agency having jurisdiction]. A lawyer practicing in a jurisdiction which certifies specialists must also be careful not to confuse laypersons as to his status. If a lawyer discloses

areas of law in which he practices or to which he limits his practice, but is not certified in [the jurisdiction], he, and the designation authorized in [the jurisdiction], should avoid any implication that he is in fact certified..

DR 2-101 Publicity.

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over radio broadcasted in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching positions;

(10) Memberships, offices, and committee assignments, in bar associations;

(11) Membership and offices in legal fraternities and legal societies;

(12) Technical and professional licenses;

(13) Memberships in scientific, technical and professional associations and societies;

(14) Foreign language ability;

(15) Names and addresses of bank references;

(16) With their written consent, names of clients regularly represented;

(17) Prepaid or group legal services programs in which the lawyer participates;

(18) Whether credit cards or other credit arrangements are accepted;

(19) Office and telephone answering service hours;

(20) Fee for an initial consultation;

(21) Availability upon request for a written schedule of fees and/or an estimate of the fee to be charged for specific services;

(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;

(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;

(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon

the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(25) Fixed fees for specific legal services,¹ the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information;

(C) Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to [the agency having jurisdiction under state law]. Any such application shall be served upon [the agencies having jurisdiction under state law over the regulation of the legal profession and consumer matters] who shall be heard, together with the applicant, on the issue of whether the proposal is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers.²

¹ The agency having jurisdiction under state law may desire to issue appropriate guidelines defining "specific legal services."

² The agency having jurisdiction under state law should establish orderly and expeditious procedures for ruling on such applications.

(D) If the advertisement is communicated to the public over radio, it shall be prerecorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer.

(E) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(F) Unless otherwise specified in the advertisement if a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.

(G) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under DR 2-101(B), the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(H) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of po-

tential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(I) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item. DR 2-102 Professional Notices, Letterheads and Offices.

(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification.

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and

dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a con-

tinuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

(C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

(F) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in the law.

DR 2-103 Recommendation of Professional Employment.

(A) A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-(103)(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR 2-101, and except that

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, or may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by

a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

DR 2-104 Suggestion of Need of Legal Services.

(A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

DR 2-105 Limitation of Practice.

(A) A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice permitted under DR 2-101(B), except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his

letterhead and office sign.

(2) A lawyer who publicly discloses fields of law in which the lawyer or the law firm practices or states that his practice is limited to one or more fields of law shall do so by using designations and definitions authorized and approved by [the agency having jurisdiction of the subject under state law].

(3) A lawyer who is certified as a specialist in a particular field of law or law practice by (the authority having jurisdiction under state law over the subject of specialization by lawyers) may hold himself out as such, but only in accordance with the rules prescribed by that authority.

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation,

and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an agreement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

DR 2-107 Division of Fees

Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

DR 2-108 Agreements Restricting the Practice of a Lawyer.

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

DR 2-109 Acceptance of Employment.

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps

taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

DR 2-110 Withdrawal from Employment.

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condi-

tion renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

* * *

PROPOSAL "B"

CANON 2

A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE

EC 2-1 * * *

Recognition of Legal Problems

EC 2-2 The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs should be motivated by a desire to benefit the public in its awareness of legal needs and selection of the most appropriate counsel rather than to obtain publicity for particular lawyers.

EC 2-3 Whether a lawyer acts properly in volunteering advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper whenever it is motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if motivated by a desire to cause legal action to be taken merely to harass or injure another. A lawyer best serves the public if he does not volunteer advice in order to obtain private gain in regard

to employment. A lawyer should not contact a nonclient, personally or through a representative, for the purpose of being retained to represent him for compensation.

EC 2-4 A lawyer who volunteers advice that one should obtain the services of a lawyer and who then accepts employment, compensation, or other benefit in connection with that matter gives at least the appearance of impropriety. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

EC 2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems and informing them of his services should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laypersons should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Selection of a Lawyer

EC 2-6 * * *

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, per-

sons of limited education or means, and others who have little or no contact with lawyers. Lack of information about the availability of lawyers, the specialized competence of particular lawyers, and the expense of initial consultation has been said to lead laypersons to avoid seeking legal advice.

EC 2-8 Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendations of third parties — relatives, friends, acquaintances, business associates, or other lawyers — and restrained publicity may be helpful. A lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisements and public communications, whether in law lists, announcement cards, newspapers, other forms or radio, should be formulated to convey only information that is necessary to make an appropriate selection. Self-laudation should be avoided. Information that may be helpful in some situations would include: (1) office information, such as, name, including name of law firm and names of professional associates; addresses; telephone numbers; credit card acceptability; languages spoken and written; and office hours; (2) biographical information; (3) description of the practice but only by using designations and definitions authorized by [the agency having jurisdiction of the subject under state law] for example, one or more fields of law in which the lawyer or law firm practices; a statement that practice is limited to one or more fields of law; and a statement that the lawyer or law firm specializes in a particular field of law practice but only by using designations, definitions and standards authorized by [the agency having jurisdiction under state law]; and (4) permitted fee informa-

tion.

EC 2-8A The proper motivation for commercial publicity by lawyers lies in the need to inform the public of the availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical information, does not provide that public benefit. For example, prominence should not be given to a prior governmental position outside the context of biographical information. Similarly, the use of media whose scope or nature clearly suggests that the use is intended for self-laudation of the lawyer without concomitant benefit to the public such as the use of billboards, electrical signs, soundtrucks, or television commercials distorts the legitimate purpose of informing the public and is clearly improper. Indeed, this and other improper advertising may hinder informed selection of competent, independent counsel, and advertising that involves excessive cost may unnecessarily increase fees for legal services.

EC 2-8B. Advertisements and other communications should make it apparent that the necessity and advisability of legal action depends on variant factors that must be evaluated individually. Because fee information frequently may be incomplete and misleading to a layperson, a lawyer should exercise great care to assure that fee information is complete and accurate. Because of the individuality of each legal problem, public statements regarding average, minimum or estimated fees may be deceiving as will commercial publicity conveying information as to results previously achieved, general or average solutions, or expected outcomes. It would be misleading to advertise a set fee for

a specific type of case without adhering to the stated fee in charging clients. Advertisements or public claims that convey an impression that the ingenuity of the lawyer rather than the justice of the claim is determinative are similarly improper. Statistical data or other information based on past performance or prediction of future success is deceptive because it ignores important variables. Only factual assertions, and not opinions, should be made in public communications. It is improper to claim or imply an ability to influence a court, tribunal, or other public body or official except by competent advocacy. Commercial publicity and public communications addressed to undertaking any legal action should always indicate the provisions of such undertaking and should disclose the impossibility of assuring any particular result. Not only must commercial publicity be truthful but its accurate meaning must be apparent to the layperson with no legal background. Any commercial publicity or advertising for which payment is made should so indicate unless it is apparent from the context that it is paid publicity or an advertisement.

EC 2-9 The traditional regulation of advertising by lawyers is rooted in the public interest. Competitive advertising through which a lawyer seeks business by use of extravagant, artful, self-laudatory or brash statements or appeals to fears and emotions could mislead and harm the layperson. Furthermore, public communications that would produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers and would be harmful to society. Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship, being personal and unique, should not be established as the result of pressures or deceptions. However, the desirability of affording the public

access to information relevant to legal rights has resulted in some relaxation of the former restrictions against advertising by lawyers. Those restrictions have long been relaxed in regard to law lists, announcement cards and institutional advertising and in certain other respects. Historically, those restrictions were imposed to prevent deceptive publicity that would mislead laypersons, cause distrust of the law and lawyers, and undermine public confidence in the legal system, and all lawyers should remain vigilant to prevent such results. Only unambiguous information relevant to a layperson's decision regarding his legal rights or his selection of counsel, provided in ways that comport with the dignity of the profession and do not demean the administration of justice, is appropriate in public communications.

EC 2-10 The Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer while avoiding falsity, deception, and misrepresentation. All publicity should be evaluated with regard to its effect on the layperson with no legal experience. The non-lawyer is best served if advertisements contain no misleading information or emotional appeals, and emphasize the necessity of an individualized evaluation of the situation before conclusions as to legal needs and probable expenses can be made. The attorney-client relationship should result from a free and informed choice by the layperson. Unwarranted promises of benefits, overpersuasion, or vexatious or harassing conduct are improper.

EC 2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a name which could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder is not proper. For many years some law firms have

used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not mislead thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12 * * *

EC 2-13 * * *

EC 2-14 In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate if it is factual, a limitation of his practice or that he practices in one or more particular areas or fields of law in public announcements which will assist laypersons in selecting counsel and accurately describe the limited area in which the lawyer practices but only if he complies with the designations and definitions authorized and approved by [the agency having jurisdiction of the subject under state law]. A lawyer practicing in a jurisdiction which certifies specialists must also be careful not to confuse laypersons as to his status. If a lawyer limits his practice, but is not certified in the jurisdiction, he should clearly state in any announcement of limitation of practice that he is not certified. If the jurisdiction does not certify specialists, the lawyer should exercise care not to imply that he has been certified.

EC 2-15 * * *

DR 2-101 Publicity and Advertising.

(A) A lawyer shall not on behalf of himself, his partner, or associate, or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim.

(B) Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:

(1) Contains a material misrepresentation of fact;

(2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;

(3) Is intended or is likely to create an unjustified expectation;

(4) States or implies that a lawyer is a certified or recognized specialist other than as permitted by DR 2-105;

(5) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;

(6) Relates to legal fees other than:

(a) A statement of the fee for an initial consultation;

(b) A statement of the filed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

(c) A statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(d) A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter;

(e) The availability of credit arrangements; and

(f) A statement of the fees charged by a qualified legal assistance organization in which he participates for specific legal services the description of which would not be misunderstood or be deceptive; or

(7) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

(C) A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication which:

(1) Is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;

(2) Contains statistical data or other information based on past performance or prediction of future success;

(3) Contains a testimonial about or endorsement of a lawyer;

(4) Contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public;

(5) Appeals primarily to a layperson's fear, greed, desire for revenge, or similar emotion; or

(6) Is intended or is likely to attract clients by use of showmanship, puffery, self-laudation or hucksterism, including the use of slogans, jingles or garish or sensational language or format.

(7) Utilizes television or until [the agency having jurisdiction under state law] shall have determined that the use of such media is necessary in light of the existing

provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services.

(D) A lawyer shall not compensate or give anything of value to a representative of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item. A paid advertisement must be identified as such unless it is apparent from the context that it is a paid advertisement. If the paid advertisement is communicated to the public by use of radio, it shall be prerecorded, approved for broadcast by the lawyer and a recording of the actual transmission shall be retained by the lawyer.

DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

(A) A lawyer or law firm shall not use or participate in the use of a professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law list, legal directory listings, or a similar professional notice or device if it includes a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101 (B) or that violates the regulations contained in DR 2-101(C).

(B) A lawyer shall not practice under a name that is misleading as to the identity, responsibility or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B), or is contrary to law. However, the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line

of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of or public communications by the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of or public communications by the firm.

(C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(E) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in the law.

DR 2-103 Recommendation or Solicitation of Professional Employment.

(A) A lawyer shall not seek by direct mail or other form of personal contact and shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer, or assist another person in so doing, except that if success in asserting rights or defenses of his clients in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may ac-

cept employment from those he is permitted under applicable law to contact for the purpose of obtaining their joinder. This Disciplinary Rule does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from requesting referrals from a lawyer referral service operated, sponsored, or approved by a bar association or from cooperating with any other qualified legal assistance organization.

Committee Note: Present DR 2-103 (B) becomes DR 2-103(C).

(B) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm, as a private practitioner, if:

(1) The promotional activity involves use of a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101(C); or

(2) The promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct.

(C) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay for public communications permitted by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

(D) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct

prohibited under this Disciplinary Rule.

DR 2-104 Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice if:

(1) The advice embodies or implies a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B); or that violates the regulations contained in DR 2-101(C); or

(2) The advice involves the use by the lawyer of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct.

DR 2-105 Limitation of Practice.

(A) A lawyer shall not hold himself out publicly as, or imply that he is, a recognized or certified specialist, except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms, on his letterhead and office sign. A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms, on his letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer," or any combination of those terms, on his letterhead and office sign.

(2) A lawyer who is certified as a specialist in a particular field of law or law practice by [the authority having jurisdiction under state law over the subject of specialization by lawyers] may hold himself

out as such specialist but only in accordance with the rules prescribed by that authority.

(B) A statement, announcement, or holding out as limiting practice to a particular area or field of law does not constitute a violation of DR 2-105 (A) if the statement, announcement, or holding out complies with the designations and definitions authorized by [the agency having jurisdiction of the matter under state law], does not include a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101(C), and if, [in a jurisdiction having a program for certifying specialists], it clearly reflects that the lawyer has not been officially recognized or certified as a specialist.

* * *

Definitions

As used in the Disciplinary Rules of the Code of Professional Responsibility:

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(5) * * *

(6) * * *

(7) "A Bar association" includes a bar association of specialists as referred to in DR 2-105(A)(1) or (2).

(8) "Qualified legal assistance organization" means a legal aid, public defender, or military assistance office; a lawyer referral service; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designated to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, is not in violation of any applicable law, and has filed with [the appropriate disciplinary authority] at least annually a report with respect to its legal service plan.

Table 4

CURRENT TOPICS OF INTEREST IN
DISCIPLINARY ENFORCEMENT

Several topics now being considered by various state level jurisdictions within the United States deserve attention:

Non-Lawyer Representation on Disciplinary Boards

The states of California, Colorado, Georgia, Idaho, Indiana, Maine, Michigan, Minnesota, Nebraska, New Hampshire, Washington and Wisconsin, have added non-lawyer representation to their disciplinary boards. Reasons given for adding non-lawyer members to disciplinary boards include the following: this opens the disciplinary process to public scrutiny; the legal profession does not remain totally self-regulating; and such non-lawyer members bring new insights to disciplinary deliberations. Reasons given for not adding non-lawyer members to disciplinary boards include the following: non-lawyers do not understand the intricacies of the legal process; they may be overly influenced by lawyer members of the boards; they may not maintain the confidentiality of the proceeding; and they are not needed because review by the highest court insures due process to the public and respondent attorneys.

Auditing or Verification of Trust Accounts

In Delaware, Florida, Iowa, Maryland, New Mexico and New Jersey, specific procedures have been instituted which either permit the audit or verification of lawyers' trust accounts by a board appointed by their highest courts. Such procedures may or may not be directly linked to the disciplinary process. The purpose of such procedures (which are in the tradition of those used in England and Canada) is to appraise attorneys of their obligations regarding the maintenance of trust accounts and provide for the verification of such accounts so they are maintained in a manner which complies with those professional obligations.

Fee Dispute Arbitration

Fee disputes are a major area of conflict between attorneys and their clients. In Alaska, by an order of the Supreme Court of Alaska, and in 33 other jurisdictions on a lesser scale, fee dispute arbitration systems have been established so that fee disputes between lawyers and clients may be arbitrated before a panel of the local bar rather than permitting such disputes to remain unsettled or end in litigation. In some instances, non-lawyers have been included among the arbitrators of fee disputes. As yet, not enough reports have been received to determine the effectiveness of fee dispute arbitration.

(46 U.S.L.W.1, 3-12 (Aug. 23, 1977))